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ABSTRACT

The purpose of this policy manual is to disseminate the Migrant Education Program statute and regulations and to assist State Education Agencies (SEA) in planning, implementing, and evaluating Chapter 1 Migrant Education Programs. The manual also may assist parents in becoming involved in all aspects of the Migrant Education Program and to ensure that the officers and employees of the Department of Education uniformly interpret, apply, and enforce program requirements. The manual provides information about: (1) state application and funding; (2) annual needs assessment; (3) coordination; (4) identification and recruitment; (5) eligibility; (6) program services; (7) summer school programs; (8) parental involvement; (9) migrant education program fiscal requirements; (10) state administration; and (11) evaluation. It also summarizes the provisions of the General Education Provisions Act (GEPA) and the Education Department's General Administrative Regulations (EDGAR) that relate to the Migrant Education Program. The appendices include: (1) Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended through December 31, 1990; (2) GEPA, as amended through May 31, 1991; (3) EDGAR, as of August 16, 1990; (4) 34 CFR Part 205: Section 1203 Coordination Project Regulations; (5) services to private school children; (6) the relationship of General Chapter 1 Statutory Provisions Affecting State and Local Agencies to the Migrant Education Program; and (7) 34 CFR Part 201: Migrant Education Program Regulations (as of July 1, 1990). This document also includes a list of acronyms used in the manual and an index. (LP)

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MIGRANT EDUCATION PROGRAM POLICY MANUAL

MIGRANT EDUCATION PROGRAMS OPERATED BY STATE EDUCATION AGENCIES

Part D of Chapter 1 of Title I
Elementary and Secondary Education Act of 1965
as amended by the
Augustus F. Hawkins - Robert T. Stafford
Elementary and Secondary School Improvement Amendments of 1988
(Public Law 100-297)

U.S. DEPARTMENT OF EDUCATION

Office of Migrant Education
November 1991

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ACRONYMS USED IN THE MANUAL

CAMP - College Assistance Migrant Program
CAI - Computer Assisted Instruction
CFR - Code of Federal Regulations
COE - Certificate of Eligibility
CSSO - Chief State School Officer
Department - U. S. Department of Education
DOL - U. S. Department of Labor
ECIA - Education Consolidation and Improvement Act
ECS - Education Commission of the States
ED - U. S. Department of Education
EDGAR - Education Department General Administrative Regulations
ERIC - Education Resources Information Center
ESEA - Elementary and Secondary Education Act
FAR - Federal Acquisition Regulations
FTE - Full Time Equivalent
FY - Fiscal Year
GAO - General Accounting Office
GCS - ED Grants and Contracts Service
GED - General Educational Diploma
GEPA - General Education Provisions Act
HEP - High School Equivalency Program
HHS - U. S. Department of Health and Human Services
HUD - U. S. Department of Housing and Urban Development
I&R - Identification and Recruitment
IMEC - Interstate Migrant Education Council (ECS)
JTPA - Jobs Training Partnership Act
LEA - Local Education Agency
LQM - Date of Last Qualifying Move
MEP - Migrant Education Program
MEES - Migrant Education Even Start
MPAS - Migrant Program Allocation System
MSFW - Migrant and Seasonal Farmworker Services
MSRTS - Migrant Student Records Transfer System
MSWPA - Migrant and Seasonal Farmworker Protection Act
NASDME - National Association of State Directors of Migrant Education
NPRM - Notice of Proposed Rulemaking
NRG - Non-Regulatory Guidance
OA - Operating Agency
OALJ - Office of Administrative Law Judges
OESE - ED Office of Elementary and Secondary Education
OIG - Office of the Inspector General
OME - ED Office of Migrant Education
PAC - Parent Advisory Council
PCC - Section 1203 Program Coordination Center
PPE - Per-Pupil Expenditure
QAD - Qualifying Arrival Date

R-TAC - Rural Technical Assistance Center
SEA - State Education Agency
Secretary - The Secretary of the U. S. Department of Education
TAC - Technical Assistance Center
USDA - U. S. Department of Agriculture
WIC - Special Supplemental Food Program for Women, Infants and Children

INTRODUCTION

The Migrant Education Program (MEP) is authorized by Part D, Subpart 1 of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Augustus F. Hawkins - Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297). Sections 1201 and 1202 of this statute provide financial assistance through State education agencies (SEAs) to operating agencies to meet the special educational needs of children of migratory agricultural workers. This assistance is designed to improve the educational opportunities of migratory children by helping them succeed in the regular program, attain grade-level proficiency, and improve achievement in basic and more advanced skills that all children are expected to master. Section 1203 of the statute provides financial assistance to SEAs to improve the interstate and intrastate coordination among States and operating agencies of the educational programs available for migratory children.

The ESEA governs the overall administration and operation of the Migrant Education Program. Certain provisions of other statutes, such as the General Education Provisions Act (GEPA) and Title VI of the Civil Rights Act of 1984 are also applicable to the program. The regulations for the Migrant Education Program are contained in 34 CFR Parts 201 and 205. In addition, the Education Department's General Administrative Regulations (EDGAR) Parts 76, 77, 80, 81, 82, 85 and 86 are applicable, in whole or in part, to the program.

Section 1436 of ESEA requires that the Department of Education (ED) prepare this policy manual, distribute it to SEAs and make it available to parents and other interested individuals, organizations, and agencies. The purposes of the policy manual are to:

- assist SEAs and operating agencies in preparing applications, meeting applicable program requirements, and enhancing the quality, increasing the depth, or broadening the scope of the Migrant Education Programs;
- assist SEAs in achieving proper and efficient administration of Chapter 1 Migrant Education Programs;
- assist parents in becoming involved in the planning, implementation, and evaluation of Migrant Education Programs and projects; and
- ensure that the officers and employees of ED, including auditors, uniformly interpret, apply, and enforce the Migrant Education Program requirements.

This policy manual contains acceptable but not exclusive guidance concerning Migrant Education Program requirements. While SEAs may wish to consider the guidance in this document in developing their own guidelines and standards, they are free to develop alternative approaches that are consistent with the Migrant Education Program statute and regulations, but more in keeping with particular needs and circumstances. However, compliance with the guidance in this document shall be deemed to be compliance with the statute and regulations by ED officials, including the Office of the Inspector General of the Department of Education.

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I. STATE APPLICATION AND FUNDING

Under the Chapter 1 State Migrant Education Program (MEP), the U.S. Department of Education (ED) awards grants to State Education Agencies (SEAs) for the purpose of establishing and improving programs and projects that are designed to meet the special educational needs of children of migratory agricultural workers or migratory fishers. Grants are awarded after review and approval of an application that each SEA submits to ED's Office of Migrant Education. This chapter discusses the SEA application process, requirements for receiving MEP funds, and the process that ED uses to determine the amount of MEP funds for which each SEA may apply.

Statutory Requirements:

Sections 1201, 1202, and 1432(a) of Chapter 1 of Title I, ESEA; Section 412(b) of GEPA

Regulatory Requirements:

Sections 201.10, 201.11, 201.13, 201.20, 201.21, 201.22, 201.24 and 201.30
Sections 76.703 - 76.707 of EDGAR

Eligibility of an SEA

Q1. Who is eligible to receive a State Migrant Education Program grant from the Department?

A. Only a State education agency (SEA) may receive an MEP grant from the Department. However, public agencies or private nonprofit organizations, including institutions of higher education, may participate in the program through subgrants or contracts with SEAs.

Q2. May two or more SEAs jointly apply for a State grant?

A. Yes. Section 1201 of the Chapter 1 statute and Section 201.24 of the MEP regulations provide that an SEA or a combination of SEAs may apply for a State grant. One of the SEAs should be designated as a principal contact with the Department for program and fiscal matters related to the proposed project. A joint application should describe how SEAs will cooperate on the migrant education project and outline each SEA's responsibilities.

SEA Application Process

Q3. How does an SEA apply for a State MEP grant?

A. Application packages containing forms and instructions can be obtained from ED's Office of Migrant Education (OME). An SEA applies by submitting a completed application to the Department.

Q4. What kinds of information must the SEA's application contain?

A. The SEA's application must contain sufficient detail on various aspects of the State's migrant program as described in the application package. Topics the application must address include: results of the Statewide needs assessment, program objectives and planned uses of MEP funds, identification and recruitment, parental participation activities, coordination with other programs, and the SEA's process for ensuring that local operating agencies properly spend subgranted funds.

Q5. In addition to the application, are there other documents that an SEA must submit to ED before it can receive MEP funds?

A. An SEA must either submit, or have on file, certain assurances that are required by statute or regulation. Assurances that must be submitted to the Department are included or described in the application package.

Q6. What type of assurances are SEA applicants required to have on file or submit to the Department?

A. The SEA must make assurances to the Department with regard to compliance with specific MEP program requirements as well as with broader, government-wide requirements.

Assurances relating to program requirements concern SEA responsibilities for:

- grantee control of funds and property (Section 435(b)(2) of GEPA);
- fiscal control and fund accounting procedures (Section 435(b)(5) of GEPA);
- provision for the preschool needs of migratory children (Section 1202(a)(5) of Chapter 1);
- implementing evaluation requirements (contained in Sections 201.51 - 201.56 of the MEP regulations); and
- ensuring that subgrantees comply with all applicable statutory and regulatory requirements.

SEAs submit these five assurances on a one-time basis; once filed they remain in effect for the duration of the SEA's participation in the MEP.

Other more general assurances that must accompany the SEA's application relate to:

- compliance with various requirements that apply to all applications for Federal assistance under non-construction programs. These assurances require the authorized representative's signature on the face page; and

- certification of adherence to government-wide provisions concerning (1) Disclosure of Lobbying; (2) Debarment, Suspension, and other responsibility matters; and (3) the maintenance of a Drug-Free Workplace.

Instructions for completion are included with assurance and certification forms.

Q7. Who signs the application and assurances as the "authorized representative" of the SEA?

A. Only the Chief State School Officer (CSSO), or his or her official designee under State law, may do so.

Q8. What project period does an application cover?

A. The application may cover a project period of not more than three fiscal years. However, most SEAs submit an annual application. If an SEA's application is approved for a multi-year grant, it must submit annual updates that describe any proposed changes in the MEP that must be made because of significant changes in the numbers or needs of children to be served or the services to be provided. Regardless of the length of the project period covered in the application, grants are made on an annual basis.

Q9. Are there circumstances under which an approved application must be amended before the end of the project year?

A. Yes. If, during the course of the project year, the SEA finds that significant changes have occurred in the numbers or needs of the children to be served or the services to be provided, it must submit a description of the changes to the Secretary of Education. If the changes impact on the SEA's current MEP budget, the SEA must also submit a revised budget that supports the proposed new program.

Q10. What constitutes a "significant change" in the numbers, needs, or services that would require submission of an annual update?

A. The Department has not defined the term "significant change" since determination of whether a change is significant depends largely on State-wide and/or local factors. The SEA is responsible for recognizing a particular change that has triggered the need to update or amend its State plan.

Approval of an SEA's Application

Q11. What are the standards for approval of an SEA application?

A. Section 201.13(a) of the regulations provides that an SEA application (or any updating amendment) will be approved if its description of the proposed State Migrant Education Program:

- complies with the Chapter 1 statute and applicable regulations;

- is designed to meet the special educational needs of eligible migratory children; and

- holds reasonable promise of making substantial progress toward meeting those needs.

The program application requests information that responds to these standards. If an SEA's information is not adequate, OME will contact the SEA for further information.

Q12. In its State application, how does the SEA establish that its proposed MEP "holds reasonable promise of making substantial progress toward meeting" the special educational needs of migratory children as required in Section 201.13 of the regulations?

A. The SEA does so by describing in its application how State and local needs assessments have been and will be conducted, and how the objectives for the instructional and support services to be provided relate to those assessments. In practical terms, objectives must be stated in measurable terms as desired outcomes that the SEA seeks to achieve during a specific length of time for children who will be served. These objectives or outcomes must be based on the needs assessment.

In preparing its application, an SEA might address desired achievement levels in basic and advanced skills, or desired results of providing support services in terms of desired outcomes for a particular group of children. These desired outcomes, for example, might be attainment of grade level proficiency by the end of the school year or reduction in the dropout rate for ninth graders in a local education agency (LEA) by 20 percent in two years. Regardless of what is used, the application must describe the indicators that will be used during the course of the project period to determine whether the project has made substantial progress in meeting the special educational needs of migrant children. (See Chapter II -- NEEDS ASSESSMENT, Chapter VI -- PROGRAM SERVICES, Q15, and Section 201.32(c) for the kinds of educational criteria that must be used in conducting a needs assessment.)

Q13. How does the Secretary later determine what progress has occurred?

A. The Secretary reviews the SEA application to determine whether the State's MEP has been designed in a way that is likely to hold reasonable promise of making substantial progress toward meeting the objectives stated in the application. Upon approval of the application, the desired outcomes stated in the application become the common standard that the SEA and ED use to examine the progress of migratory children served by the State's MEP. (See Chapter XI - EVALUATION.)

Q14. What responsibilities does an SEA assume once its application is approved?

A. The SEA is required to implement its Migrant Education Program in accordance with its approved MEP application, subsequent amendments, and all applicable Federal laws and regulations. (See Section 201.13(b).) The SEA is responsible for all aspects of the program, whether performed directly by the SEA, an operating agency, or a contractor.

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This responsibility also applies in cases where different units of the SEA, even if in completely different offices and under different managers, are assigned responsibility for one or more components of the State's MEP. The agency must ensure that lines of authority and responsibility are clear and that appropriate program coordination takes place.

Amount Available for an SEA Grant

Q15. How does ED determine the amount of MEP funds for which each SEA may apply?

A. Congress appropriates a total amount for the Migrant Education Program each year. Of this amount, ED sets aside a portion for coordination activities authorized under Section 1203 of Chapter 1. The remainder of the appropriation is then available for allocation to the States.

Funds are allocated to the States through the funding formula provided in Section 1201(b) of the statute. This formula is based on (1) the estimated number of migratory children age 3 through 21 who reside in each State full- and part-time during each calendar year; (2) the number of migratory children enrolled in the State's summer programs; and (3) the State per pupil expenditure (PPE) for each State and the nation as a whole.

The steps involved in determining State allocations follow:

Step 1. Determine each State's total full-time equivalent (FTE) count of migratory children for the previous calendar year by adding together the FTE number of migratory children residing within the State and the FTE number of migratory children enrolled in summer programs operated by the State. These data are provided to ED through the Migrant Student Record Transfer System (MSRTS).

Note: One regular year FTE = 365 days of residency in a State. One summer FTE = 109 days of residency, and covers enrollment in a State's MEP summer programs that operate at any time between May 15 - August 31 when the regular school term is not in session.

Step 2. Obtain the PPE data for each State and calculate the national PPE. These data are provided each year to the National Center for Education Statistics (NCES) by the States.

Step 3. Multiply each State's PPE, as determined in Step 2, by 40 percent in order to determine the State's formula PPE. Compare the State's formula PPE with 40 percent of the national PPE:

- A. In cases where a State's formula PPE is less than 80 percent of 40 percent of the national PPE, raise the State's formula PPE to 80 percent of 40 percent of the national PPE.

B. In cases where a State's formula PPE is more than 120 percent of 40 percent of the national PPE, reduce the State's formula PPE to 120 percent of 40 percent of the national PPE.

C. In cases where a State's formula PPE falls within the ranges described in A and B above, no adjustments are made.

Note: The statute requires additional adjustments in Puerto Rico's formula PPE.

Step 4. Multiply the figures determined in Step 1 and Step 3 for each State to determine the maximum amount that each State is entitled to under the formula.

Step 5. Ratably reduce the amount reached in Step 4 to the amount appropriated to determine the final State allocations.

Q16. What is the State's per pupil expenditure (PPE) factor used in the allocation formula?

A. Each SEA is required to report annually both the amount of State, local, and Federal funds expended for elementary and secondary education, and average daily attendance data. From these data, ED deducts the expenditures for all Chapter 1 and Chapter 2 programs and computes the State PPE. The Chapter 1 statute requires that per pupil expenditure data for the third preceding fiscal year be used in the allocation formula, unless more recent data is available.

Q17. How is a State's total regular year FTE computed?

A. Under Section 1201(b) of the Chapter 1 statute, a State's total regular year FTE is the sum of: (1) the estimated number of migratory children age 3 to 21, inclusive, who reside in a State full time; and (2) the FTE of the estimated number of migratory children age 3 to 21, inclusive, who reside in the State part time, as determined by the Secretary in accordance with MEP regulations.

An FTE is generated in the following ways:

Full-year resident: A child who is determined to have resided in the State all year generates one FTE for that State. Some examples include:

- a formerly migratory child who stays in the same district all year;
- a child identified and recruited as an intrastate currently migratory child at several locations within a single state during the same calendar year, but not recruited that year in another State; and
- a child identified and recruited as an interstate currently migratory child prior to January 1, and who thereafter is not recruited as a resident of another

State during the calendar year (whether or not the child actually moved to that State).

Full-year FTEs for all children in this category are aggregated to determine each State's total full-year FTE credit.

Part-year resident: A child who is determined to have resided in a State for less than a full year generates part of an FTE for that State. Based on enrollment information provided by each State, MSRTS determines the number of calendar days in a year that the child is considered to have resided in a particular State. This fraction of the year constitutes the portion of one FTE that the child generates for the State. Some examples include:

- a child who makes a move (either qualifying or non-qualifying) into State A on September 1 and is not identified and recruited in State B by December 31. State A will receive part-year FTE credit for the remaining portion of the year.
- a child who makes a qualifying move into State A before January 1 but is identified and recruited in State B sometime during the following year, e.g., July 25. State A will receive part-year FTE credit for the period between January 1 and July 25.
- a child who makes a qualifying move from State A to State B on February 1, and is later identified, on the basis of a non-qualifying move, as residing in State C on May 15. State A will receive a part-year FTE credit for the period until February 1. State B will receive a part-year FTE credit for the period between February 1 and May 15. If the child is not identified as residing in another State before the end of the calendar year, State C will receive part-year FTE credit for the period between May 15 and the end of the year.

Partial FTEs for all children in this category are aggregated to determine each State's total part-year FTE credit.

The regulations define a migratory child (Section 201.3) and specify that the estimated number of a State's migratory children is the MSRTS count of children whose basis for eligibility has been properly recorded (Sections 201.20 and 201.30). Only those migratory children who are properly recruited, and for whom residency information is entered into the MSRTS, are included in the estimate of a State's number of migrant children. (See Chapter IV -- IDENTIFICATION AND RECRUITMENT and Chapter V -- ELIGIBILITY.)

Q18. How much residency credit may a State receive for each child who is recruited at a special project site designed to assist migrant families traveling to obtain qualifying employment at locations in other areas of the State or in other States?

A. If the child is in transit to a location in the State in which the project site is located, the State enters the child, like any other child, in the MSRTS, and may receive the normal part-year residency credit. However, if the child is in transit to a location in another State, the State may enter the child in the MSRTS only for the brief period the child resides at the project site. The date of the child's expected departure from the project site must be entered into MSRTS, and the State may receive only that small part-year residency credit. (See Section 201.20(a)(3).)

Q19. How is a State's summer FTE computed?

A. States receive summer residency credit for the total number of days, as reported to the MSRTS, for which migrant children participate in special MEP funded summer programs and projects. These summer programs and projects may take place at any time during the 109-day period between May 15 and August 31 of each year provided that the area school district's regular school term is not in session. Children who participate in summer programs for a portion of this period generate partial FTEs, which are calculated by dividing the total days of their participation in the program by 109. The total of these partial FTEs is the State's total summer FTE.

For example, a State operating an MEP-funded summer school for the six-week period between July 1 and August 11 would receive 42 days of credit for each eligible currently or formerly migratory child, who participated for the full term. Each child is credited for 42/109 of an FTE. If 10 children participated during the entire summer program, they would generate 420/109 or 3.853 FTEs. Because each of these children is residing in the State during the period of participation in summer school, each child is also generating regular year FTE credit for the State during this same period. The child's beginning and end date of participation in the summer program must be reported to MSRTS.

For the purposes of the MEP allocation formula, the State's total FTE count is the sum of the State's total summer FTE and the State's total regular year FTE.

Maximum Size of an SEA Grant

Q20. What determines the maximum size of an SEA grant?

A. The size of an SEA grant is limited to the amount calculated under the formula discussed in Q15 of this chapter. (See Section 201.20(a).)

Q21. Is the SEA entitled to receive the amount of MEP funds that is computed under the MEP formula?

A. No. The formula does not establish an SEA's entitlement. When the total amount appropriated for the MEP is insufficient to pay the amounts computed by formula, then the amounts available for allocation to the SEAs are ratably reduced to the amount appropriated. Moreover, these amounts generated by the formula are not entitlements but the maximum amounts for which SEAs may apply. The amount an SEA is entitled to receive, which typically is the same as the maximum amount for which it may apply, is the amount that the Secretary determines is needed to carry out activities described in the SEA's application. (See Section 201.21.)

Carryover

Q22. What are "carryover funds?"

A. After approving an SEA's application, the Department provides a grant award to the SEA to support MEP activities that are conducted during the 15-month period between July 1 (or the date of the grant award) and September 30 of the following year. Section 412(b) of GEPA provides that any funds not obligated by the SEA by the end of the 15-month period remain available to the SEA for obligation in the succeeding fiscal year. Funds in this category -- that is, funds that are not obligated in the first 15-month period but that remain available for obligation in the succeeding fiscal year -- are known as "carryover funds."

Q23. Under the MEP, are carryover funds automatically available for use by an SEA and its operating agencies?

A. No. SEAs must estimate the amount of their carryover in their applications or amendments, and must describe how these funds will be used. Approval of a State's application or amendment constitutes approval of its request to use these carryover funds.

Q24. Are program funds that have been subgranted to an operating agency, but which remain unobligated by that operating agency at the end of the Federal fiscal year (September 30), considered a part of the SEA's carryover?

A. Yes. All MEP funds that are unobligated at the end of the fiscal year, whether remaining in the Federal account or drawn down by the SEA or operating agency are included in carryover funds. Accordingly, an operating agency holding such funds should make sure to obtain authorization from the SEA before it obligates any of these funds in the new fiscal year beginning on October 1. Moreover, under Section 201.18(b) of the MEP regulations, the SEA's approval of the agency's subgrant application does not create an entitlement to MEP funds in any subsequent fiscal year.

SEAs are encouraged to recover all unobligated funds at the end of each Federal fiscal year and reallocate these carryover funds for use in the subsequent fiscal year.

Q25. What are "obligations"?

A. Under Section 80.3 of EDGAR, obligations are the amounts of orders placed, contracts and subgrants awarded, services received, and similar transactions during a given period, which will require payment by the grantee during the same or future period. Examples of obligations include:

- a contract with a CPA firm to conduct an audit;
- a purchase order issued for student standardized tests; and
- a salary and fringe benefit agreement.

Sections 76.703 through 76.707 of EDGAR contain the specific rules governing obligations.

Q26. Under what program requirements must carryover funds be used?

A. Carryover funds must be used in accordance with the statute and regulations that are in effect for the carryover period -- not the legislation that was in effect during the year for which the funds were appropriated.

Q27. Does the 15 percent limitation on an SEA's carryover contained in Section 1432(b) of Chapter 1 apply to MEP funds?

A. No.

Q28. When should the SEA report the actual amount of carryover to ED?

A. Each SEA should submit its report of actual carryover in late October or early November. If the actual amount cannot be reported by November 28, the SEA should request an extension.

__Reallocation of Excess Funds__

Q29. What are "excess funds," and how does the Secretary determine whether they are available for reallocation?

A. In determining the amount of an SEA grant under the provisions of Section 201.21, the Secretary may determine that the amount available under the MEP funding formula is more than the amount that the SEA needs to carry out program activities. These funds then become "excess funds" that can be provided to other SEAs whose MEP grants otherwise would be insufficient to serve the eligible migrant children residing in their States. Excess funds also might become available if an SEA determines that the amount that it receives, or for which it could apply, is greater than the amount it needs to carry out activities described in its MEP application.

Q30. What can the SEA do if it disagrees with the Secretary's determination that the amount for which it may apply appears to include excess funds?

A. Within 15 days after receiving the Secretary's notification that a portion of the funds available to the SEA is being considered for reallocation, the SEA may request an opportunity to explain why this action is unwarranted. Based on the SEA's explanation, the Secretary either proceeds with the reallocation or decides not to do so. (See Section 201.22(b).)

Q31. How might the Secretary distribute excess funds?

A. Depending on when the Secretary determines that excess funds are available, the Secretary might either (1) notify SEAs that they may apply for a share of these funds that is proportionate to the relative size of their grant awards; or (2) request and evaluate, on a competitive basis, supplemental SEA applications for additional MEP funds to meet unmet needs of their States' migratory children.

Bypass of an SEA

Q32. What is a "bypass?

A. The MEP is a State-operated and administered program. However, under certain circumstances the Secretary may enter into a special arrangement with one or more public or nonprofit private agencies to implement the migrant education program in all or part of the State. This special arrangement is called a "bypass." (See Section 201.24.)

Q33. When may the Secretary make a special arrangement with another agency to operate all or part of the State's Migrant Education Program?

A. The Secretary may make such an arrangement upon a determination that --

- an SEA is unable or unwilling to conduct an educational program for migratory children (including those attending private schools) who are eligible to be served;
- the arrangement would result in more efficient and economic administration of the program; or
- the arrangement would add substantially to the welfare or educational attainment of the migratory children who are eligible to be served.

The Secretary does not enter into this arrangement without first providing to the affected SEA reasonable notice and an opportunity for a hearing. (See Section 201.24(a) and (c).)

Q34. How does a bypass work?

A. The Secretary typically announces an intent to provide services by bypass and invites bids from eligible agencies. After reviewing the bids, ED then executes a grant or contract with a public or nonprofit agency which establishes the terms and conditions of the bypass. The agency selected to implement the special arrangement is then responsible for administering the program consistent with the SEA's obligations under the MEP statute and regulations.

Q35. What is the SEA's role in the case of a bypass?

A. The SEA does not have a role in the administration or operation of the program covered by a bypass. Full responsibility for the program rests with the agency funded through the bypass. However, the funded agency must be able to coordinate activities with the SEA in view of the statutory requirements in Section 1202(a) of Chapter 1 for coordination with other Federal, State, and local programs.

Q36. Where do the funds come from for a bypass?

A. The Secretary uses MEP funds that would otherwise be distributed to the affected SEA for this purpose.

II. ANNUAL NEEDS ASSESSMENT

Every SEA and operating agency that receives Chapter 1 MEP funds must use the results of an annual assessment of educational needs in designing and improving its Migrant Education Programs and projects. The needs assessment is based upon the best available information on (1) the special educational needs of the migratory children expected to reside in the area served; and (2) the general instructional areas and grade levels on which the program will focus. It uses established educational criteria to select migratory children to participate in the program.

The Migrant Education Needs Assessment and Evaluation System (MENAES), in coordination with the Migrant Student Record Transfer System (MSRTS), can assist SEAs and operating agencies in conducting these annual assessments by providing data on the characteristics of the migratory children to be served.

To some extent, procedures for conducting a needs assessment under the MEP parallel those used to conduct a needs assessment under the Chapter 1 LEA Program. However, there are important differences. This chapter focuses on the unique aspects of the MEP needs assessment and other related issues.

***Statutory Requirements*:**

Sections 1014(b), and 1202(a)(3) and (b) of Chapter 1 of Title I, ESEA

***Regulatory Requirements*:**

Sections 201.31, 201.32 and 201.36(a)(1)

General Requirements

Q1. What are the basic steps to an SEA and operating agency's annual needs assessments?

A. In conducting their needs assessments, the SEA and operating agency must:

- identify eligible migratory children (or their special characteristics) who are expected to reside in the area (Statewide or local) that the agency serves;
- determine the focus of the program to be provided (i.e., instructional areas and/or grade levels) based on the best available information on the needs and characteristics of all identified children;
- establish educationally related objective criteria for the selection of children to be served by the program;
- uniformly apply those educational criteria in selecting students to be served in each grade level and instructional area in which the project will focus;

- select children with the greatest need for MEP services according to the service priorities contained in Section 201.31; and
- determine (1) the educational needs of the children to be served with enough specificity to enable the project to focus on the most pressing needs; and (2) the resources that will be necessary to meet these needs.

NOTE: As in the Chapter 1 LEA program, the State and local operating agency cannot reasonably identify the grade levels and instructional areas in which a project will focus without first having information on the basic educational needs or special characteristics of all eligible children identified by the agency.

Q2. Is the SEA responsible for ensuring that needs assessment procedures developed by an operating agency to target services at the local level are consistent with procedures that the SEA uses to conduct the Statewide assessment of need?

A. Yes. Because the SEA's approved application is the basis for all uses of MEP funds in the State, the SEA and operating agencies must jointly ensure that needs assessment procedures at the operating agency level fit with those at the State level. They also must jointly ensure that local projects focus on the unmet needs of currently migratory children residing in areas they serve before serving formerly migratory children with equal or lesser needs.

Although the SEA cannot delegate its primary responsibilities to the local agency, the local agency may develop local assessment procedures. Local agencies may be better able than the SEA to identify such critical elements as the specific needs of children by grade levels, academic areas in which the project should focus, instructional settings, and materials, staffing, and teaching techniques. (See Section 201.32(a).)

Q3. May the SEA fund a local MEP project that is based on a local needs assessment, if the project does not focus on needs identified in the SEA's own approved application?

A. No.

Q4. Is the annual needs assessment used to design individual programs for each migratory child?

A. No. The needs assessment is used to design a general project of sufficient size and scope to meet the needs of migratory children expected to participate during the following project period.

Q5. How often must State and local needs assessments be conducted?

A. Both the Statewide and local needs assessments must be conducted annually.

Q6. Why are the basic needs assessment criteria in Section 1014(b) of the Chapter 1 statute also used in the Migrant Education Program?

A. Section 1014(b) of Chapter 1 provides a very detailed process for assessing needs of children eligible for the Chapter 1 LEA Program. Section 1202(a)(3) of the MEP statute requires that the "basic objectives" of that provision apply to the MEP. Therefore, Section 201.32 of the MEP regulations uses the basic Chapter 1 LEA Program criteria, but adapts them to fit the special characteristics of the MEP.

Q7. Do basic needs assessments criteria for regular school programs apply to preschool programs?

A. No. State and local needs assessments that pertain to preschool programs need only identify (1) the preschool children, or the special characteristics of those children, to be served; (2) the area in which the educational program will focus, and (3) those children who, subject to service priorities, have the greatest need for services. (See Section 201.32(e).)

Q8. Must the annual needs assessment identify both currently and formerly migratory children?

A. Yes. The SEA and the operating agencies must develop needs assessment procedures that consider the needs of all migratory children.

Q9. In designing a program for migratory students, must the needs assessment data be collected from students being served (or to be served) during the current program year?

A. No. MEP regulations require that the needs assessment be based upon an identification of the children or, if that is not possible, the special characteristics of the children, who are expected to reside in the area the project will serve. In meeting this criterion, agencies may use the best available data that reflects migratory children who either were served most recently or are likely to be served when the project is implemented. (See Section 201.32(a).)

Q10. Can SEAs and operating agencies rely on MSRTS information to help them identify the special characteristics of the children to be served if it is not possible to identify the children more directly?

A. Yes. MSRTS and MENAES may provide useful historical data on children the project is expected to serve. This information, which might include grade levels and general instructional and support needs, can be used to identify the special characteristics of migratory children who are expected to reside in the area the program or project will serve. (See Chapter XI - EVALUATION, Q13 and Q14.)

Q11. Must needs of migratory children for support services (e.g., health, dental, transportation, and counseling services) also be identified through a needs assessment?

A. Yes. The need for support services is considered a part of the special educational needs of migratory children, and, as such, is determined through the annual needs assessment. If a State or local agency intends to focus on meeting these support service needs, it should relate them to the children's instructional needs. (See Section 201.32(a)(6).)

Q12. Is the limited English proficiency (LEP) of some migratory children a factor that is addressed through the needs assessment?

A. MEP regulations require that the special educational needs of migratory children be sufficiently specified in the needs assessment to permit concentration on these children's greatest needs. Limited English proficiency may be an appropriate factor to examine in the needs assessment; however, the needs assessment must take into account the local obligation to provide services to those LEP migrant children, since operating agencies have a responsibility under Title VI of the Civil Rights Act to provide LEP children with appropriate access to their school programs out of their own funds. (See Chapter VI -- PROGRAM SERVICES, Q40.)

Q13. Since enrollment may vary depending on the availability of seasonal agricultural work in the area, must an SEA or operating agency conduct needs assessments several times during the year?

A. No. Needs assessments must be conducted only once a year. For projects that focus on the needs of currently migratory children, the needs assessment should be based on the latest available information about the needs of all the children expected to be present, including those who are likely to migrate into the project area.

However, once the needs assessments are completed and projects have begun, SEAs and operating agencies should modify their programs and projects to reflect changes in educational needs of the migrant children who, during the project period, actually are present in the areas served. SEAs should update their State applications to reflect these types of changes.

Q14. Why does Section 201.32(a)(6) require the SEA and its operating agencies to identify the library resources that are needed to meet migratory children's special educational needs? What are "library resources?"

A. Section 1014(b) requires that Chapter 1 LEA Program assessments consider the needs of children for library resources. In tailoring the basic objectives of the Chapter 1 LEA Program requirements to the MEP, program regulations require MEP projects to also focus on library resources, since there is no apparent reason why migratory and non-migratory children would have differing needs for such resources.

Library resources are not limited to books, but could include supplemental materials directly related to the agency's MEP, such as research and reference materials, audio-visual cassettes, and other materials that coordinate with instructional programs.

Q15. How do the SEA and operating agencies begin designing projects for migratory children after they have determined the needs that must be addressed?

A. In designing activities and allocating resources, all SEAs and operating agencies consider such factors as:

- personnel required, both numbers and types;
- variety and amount of instructional material, including library resources;
- extent of need of the students selected for participation;
- facility and equipment needs;
- availability of needed support services; and
- availability of MEP funds, and services from other sources.

Testing

Q16. Must the results of written or oral tests be used as the educationally related objective criteria in selecting currently migratory children for MEP services?

A. No. All children, whether currently or formerly migratory, must be selected to participate in an MEP program or project using educationally related objective criteria. Agencies whose projects focus primarily on formerly migrant children must include the results of written or oral tests as part of their selection criteria, but projects that focus on currently migratory children must rely on these test results only if it is reasonably possible to do so. (See Section 201.32 (c).) However, in conducting their needs assessments, agencies with regular school year projects that serve currently migratory children should be able to use the results of written or oral tests if those children are present on testing dates.

Agencies that rely on test results may conduct needs assessments using educational criteria that are similar to those used in the Chapter 1 LEA Program. The type of test used should take into consideration the program objectives, the grade levels, and instructional areas in which the project will focus.

Q17. Other than test results, what "appropriate educationally related objective criteria," as required in Section 201.32(c)(1), might be used in assessing the needs of currently migratory children?

A. Examples of such criteria include data on student attendance and absenteeism, objectively performed teacher assessments, reports from other school districts that migratory students previously attended, criterion referenced tests, and student progress reports. Some information may come from the latest data available from MSRTS regarding the children who will be, or are expected to be served, and their general instructional areas and grade levels. As the MENAES system is implemented, additional data will be available through MSRTS to assist in conducting needs assessments.

Q18. In conducting their needs assessments, may SEAs and operating agencies rely on testing information that is contained in the MSRTS record?

A. Yes, if the information contained in the MSRTS record is useful in designing an appropriate program or project or in selecting migrant children to participate in it.

Q19. What should agencies consider in choosing the most appropriate testing instrument?

A. In selecting a test for migrant students, MEP staff should consider the following:

- Does it adequately measure what the program wants to measure?
- Will it yield consistent results at different times with different groups?
- Is it appropriate for the population?
- Can it be consistently administered and scored?

These questions relate to the issues of reliability and validity. (See also Chapter XI - EVALUATION, Q33 and Q37.)

In general, the most useful tests are those that best match the curriculum that the operating agency uses in its migrant education project. In this regard, attention should be paid to the issues of content and construct validity. Content validity is the degree to which a test measures an intended content area. Construct validity is the degree to which a test measures an intended hypothetical construct, such as language proficiency. An evaluation instrument should have a high degree of content and construct validity in order to provide the clearest picture of the needs of eligible migrant students.

A variety of tests have been found appropriate for migrant populations. Charts listing the characteristics of frequently used tests of oral English language proficiency, achievement and early childhood education are available to assist local project staff in their decision-making. These can be obtained, at no cost, from the regional Technical Assistance Centers (TACs) and Rural Technical Assistance Centers (R-TACs) that provide services to all Chapter 1 programs.

Q20. May written or oral tests be given in Spanish or other languages as part of the needs assessment of migratory children?

A. Yes, provided that the tests are valid and reliable.

Service Priorities

Q21. What are the statutory and regulatory priorities for serving migratory children?

A. Priorities for serving migratory children are:

- currently migratory children age 3 through 21 who have not graduated from high school and, because of their age, are entitled to a free public education through grade 12. These children must be given priority in the consideration of programs and activities conducted under the Migrant Education Program.
- formerly migratory children age 3 through 21.
- currently and formerly migratory children age 2 and younger (with priority for currently migratory children).

NOTE: At the discretion of the SEA and the operating agency, currently migratory children age 2 and younger may be served ahead of formerly migratory children age 3 through 21 if, in order to provide migrant education services to preschool currently migratory children or migrant education instructional services to school-aged currently migratory children, (1) it would be necessary to provide day care or similar services to currently migratory children age 2 or younger, and (2) no funds -- except MEP funds -- are available for that purpose. (Section 201.31(b))

Q22. Is there a conflict between the requirement in Section 201.31(a) to give priority for consideration of programs and activities to currently migrant children and the requirement in Section 201.32(a)(5) that children selected for services are those who have the greatest need for special assistance?

A. No. The service priority in favor of currently migratory children does not create a blanket rule that they be served ahead of formerly migratory children regardless of circumstances. For example, if the needs assessment indicates a difficulty in differentiating between currently migratory children in greatest need and formerly migratory children in greatest need, the formerly migratory children do not have "greater need" for services. Therefore, currently migratory children must be served ahead of formerly migratory children.

However, if the needs assessment indicates that certain formerly migratory children have significantly greater educational needs than do some currently migratory children, these formerly migratory children may be provided services ahead of the currently migratory children.

Q23. Is the fact that significantly more formerly migratory children than currently migratory children reside in a State, or a portion of a State, sufficient to support a finding that those formerly migratory children have "significantly greater need?"

A. No.

Q24. Do children whose schooling has been interrupted have priority for services over those who have regularly attended school?

A. No. However, in conducting their needs assessments, the SEA and operating agency must consider whether children whose schooling has been interrupted may have greater need for MEP services because of current or past migrations, and therefore should receive MEP services ahead of other children. (See Section 201.32(b).)

Q25. Who decides whether to serve formerly migratory children with significantly greater need ahead of currently migratory children in a particular project, the SEA or the operating agency?

A. The SEA makes this decision through the statewide needs assessment and its review and approval of the operating agency's subgrant application.

Q26. In designing their MEP, what other basic factors must the SEA and its operating agencies follow, in addition to the needs assessment and service priority requirements?

A. Among the other factors the SEA and operating agency must consider in designing their programs are:

- the existence of other sources of funding (including local, State and Federal funds) and services that are available to meet the needs of migratory children (Sections 201.32(d) and 201.25(c)(3));
- whether there are sufficient concentrations of migratory children in each area to warrant implementation of a migrant education project (Section 201.25(a)(1)), and whether the educational needs of these children are specific enough to permit the SEA to concentrate services on meeting those particular needs (Section 201.36(a)(2));
- whether the size, scope, and quality of projects will be sufficient to give reasonable promise of substantial progress toward meeting the needs of the children being served (Section 201.36(b));
- the results of program evaluations (Section 201.36(c)); and
- input from parents in the planning, implementation, and evaluation of the program (Section 201.35).

III. COORDINATION

The term "coordination" refers to many very different yet related aspects of the Migrant Education Program including:

- the statutory framework under which operating agencies and SEAs must coordinate services to migratory children at the State and local levels;
- the requirement in Section 1202(a)(1) of the Chapter 1 statute that interstate and intrastate coordination take place, respectively, between States and operating agencies in a single State, in order to improve services to children who migrate from one State or school district to another;
- the requirement in Section 201.34 of the MEP regulations that, in planning and carrying out programs and projects, SEAs coordinate with other programs administered by ED and other Federal agencies;
- the requirements in Section 201.36(e) and (f) of the MEP regulations that an operating agency's MEP, and services that it provides for children who are handicapped or of limited English proficiency, be coordinated with the agency's regular school program (including services provided under the Chapter 1 LEA Program);
- the provisions in Section 1203 of the Chapter 1 statute that the Secretary fund a system for the transfer of educational and health records of migratory students, as well as other types of coordination projects; and
- the efforts that ED undertakes at the Federal level to coordinate its activities with other Federal agencies.

This chapter discusses interstate coordination, intrastate coordination, interagency coordination, and the coordination activities that ED sponsors under Section 1203 of the Chapter 1 statute.

Statutory Requirements:

Sections 1202(a)(1) and (2) and 1203 of Chapter 1 of Title I, ESEA

Regulatory Requirements:

Sections 201.11(b)(4), 201.30, 201.34, 201.36(e) and (f) and Part 205

Interagency Coordination

Q1. What is meant by interstate and intrastate coordination?

A. Interstate coordination refers to collaborative activities undertaken by two or more States in order to improve the education of migratory children in those States. Intrastate coordination refers to collaborative efforts undertaken by two or more operating agencies within a State to improve educational services to migrant children in that state. Areas for both interstate and intrastate coordination might include: curriculum, grade placement, teaching materials, credit accrual and exchange, services needed by handicapped children, dropout prevention, and health problems. Efforts to coordinate MEPs at the interstate and intrastate levels often encounter similar problems and issues.

Q2. What does Section 1202(a)(2) of Chapter 1 require in terms of SEA interagency coordination?

A. Section 1202(a)(2) of the statute requires the SEA to coordinate both the planning and implementation of its program and projects with those administered by other Federal agencies that serve migrant workers and their families.

The statute expressly identifies certain programs with which the MEP must coordinate. These programs, and examples of services they might offer, are:

- the High School Equivalency Program and College Assistance Migrant Program (HEP/CAMP), Section 418 of the Higher Education Act. HEP assists with recruitment of dropouts. CAMP provides assistance with post-secondary education to migratory students.
- the Section 402 Job Training Partnership Act (JTPA) Program, which provides stipends for migratory high school youth who participate in MEP summer leadership institutes.
- the Community Services Block Grants Act Programs. Migrant Community Block Grant Programs provide assistance in the identification and recruitment of migratory children.
- the Migrant Head Start Program, which can provide shared facilities with the MEP.
- the Migrant Health Program. Migrant Health clinics provide health examinations and screenings for migratory children who need them for enrollment in school.
- programs administered under Individuals with Disabilities Education Act (IDEA), formerly known as the Education of the Handicapped Act (EHA). These programs serve migratory children with disabilities.

The statute also requires coordination with other appropriate programs. These programs, and examples of services they might offer, include:

the Department of Education's --

- Adult Basic Education Programs. The Adult Migrant Farmworker and Immigrant Education Program provides adult education services to meet the special needs of migrant farmworkers and immigrants.

- Bilingual Education Programs, which provide services for limited English proficient children.

- Chapter 1 LEA Program, which provides compensatory education instructional services.

- Handicapped Migratory Agricultural and Seasonal Farmworker Vocational and Rehabilitative Services Program, which provides vocational rehabilitation services to disabled migratory and seasonal farmworkers and services to their family members.

- Educational Resources Information Center (ERIC) Clearinghouse on Rural Education and Small Schools, which provides resource materials on educational research and practice.

the Department of Labor's --

- Migrant and Seasonal Workers Protection Act (MSWPA) Program, which monitors the adequacy of wages, housing, and transportation for agricultural workers.

- Migrant and Seasonal Farmworker Services (MSFW), which provides outreach, job referral, training, and referral to other support services to migrant and seasonal farmworkers.

- Temporary Alien Agricultural Labor Certification Program (H-2A Program), which provides temporary, foreign farmworkers for employers who meet certification requirements.

the Department of Agriculture's --

- National School Lunch Program, which provides subsidized lunch services in schools for school children who meet certain family size and income eligibility standards.

- National School Breakfast Program, which provides subsidized breakfast services in schools for school children who meet certain family size and income eligibility standards.

- Special Milk Program, which provides subsidized or free half pints of milk for children in participating public and private schools who meet certain family size and income eligibility standards.

- Special Supplemental Program for Women, Infants and Children (WIC Program), which provides food and nutrition services for low income pregnant, postpartum and breastfeeding women, and their infants and children up to age 5.

A more complete list of the various Federal programs that provide services to migratory children and their families is contained in an appendix to the application package.

Q3. Are the Federal programs listed in Section 1202(a)(2) of the statute required by law to coordinate services with the MEP?

A. No. However, migratory children are among those who are eligible for services under those programs, and State and local MEP staff should work with the staff of the programs to ensure that migratory children receive all of the services to which they are entitled.

Q4. What should the SEA do if other agencies decline to work with MEP projects or claim that they are discouraged or prohibited from doing so?

A. After making contact with those administering these programs, the SEA, at minimum, should request a formal response to its request to coordinate services that includes the reason(s) the other agency is unable to work with the MEP. A copy of the request and response should be attached to the State application.

Q5. Aside from those agencies that administer the programs identified in Section 1202(a)(2), are there other agencies and organizations that offer services that might benefit MEPs operated at the State or local levels?

A. Yes. SEAs are encouraged to expand coordination efforts to any local, State, or Federal program that offers services to migratory children and their families. The Office of Migrant Education has compiled a national directory of organizations that provide services to migrants and seasonal farmworkers and their families. A copy of this directory is available from the Office of Migrant Education, upon request.

Q6. How might an SEA (or operating agency) undertake its coordination responsibilities?

A. An SEA (or operating agency) might identify a need for coordination either from the results of the annual needs assessment or because, in designing its projects, it learns that needed services are available from another agency. After doing so, the agency would contact the staff of the other programs to discuss services that each program provides and how formal and informal coordination might occur. If discussion results in a formal agreement or letter of understanding, that agreement would identify the specific services that each program will offer to migratory children, or to MEP administrators, teachers, or other personnel.

SEA and operating agency staff should consider contacting these other service agencies when those agencies are planning their own programs and projects, generally at least a year before coordination of services is to occur.

Q7. May one of an SEA's operating agencies refuse to coordinate its MEP services with an MEP operated by other agencies inside or outside the State?

A. No. If it does, the SEA likely will be out of compliance with the statutory requirement that it coordinate services to migratory children. The SEA may require operating agency cooperation and may take corrective action, including suspension of further subgrants, to ensure that operating agencies work together.

Q8. What is ED doing at the Federal level to help facilitate better coordination of Federal programs that can benefit migrant children?

A. The Office of Migrant Education participates in a Federal Interagency Committee on Migrants that includes officials from the other Federal agencies listed in Section 1202(a)(2) of Chapter 1.

Committee meetings are held to (1) exchange information about Federal programs that provide services to migrant farmworkers and their families; (2) examine pertinent legislation, regulations, policy guidance, and statistical information; and (3) encourage the establishment of interagency agreements that promote closer coordination among agencies offering complementary or similar services. Through these meetings, ED has entered into formal Federal interagency agreements with the U.S. Department of Health and Human Services and the U.S. Department of Agriculture.

Coordination With Chapter 1 LEA Programs

Q9. Many migratory children are also eligible to receive services under the Chapter 1 LEA Program. Must LEAs serve eligible migratory children with MEP funds?

A. No. In order to optimize the effective and efficient use of funds awarded under both Chapter 1 programs, SEAs and operating agencies (LEAs) may meet the needs of educationally deprived migratory children by providing any combination of services funded by the Chapter 1 LEA and the Migrant Education Program. Because the MEP is State-operated and the LEA Program is LEA-operated, SEA and LEA staffs administering each program must work together to ensure that both programs' funds are used effectively. Any LEA decision on use of funds must be approved by the SEA through its approval processes for the Chapter 1 LEA and MEP subgrant applications.

In designing and implementing joint Chapter 1 programs, the SEA and LEAs must comply with the following program requirements:

- The use of MEP funds must be based on annual statewide and local needs assessments. The MEP statewide needs assessment must assess the special educational needs of all migratory children across the State, taking into account the service priorities favoring currently migratory children, whether or not a child is educationally deprived and attending a Chapter 1 LEA program eligible school. (See Section 201.31(a).)

- The use of Chapter 1 LEA Program funds must be based on an annual LEA needs assessment. The Chapter 1 LEA Program needs assessment must determine the special educational needs of all educationally deprived children in eligible attendance areas, including educationally deprived children eligible for the Chapter 1 MEP. (See Section 200.31(b).)

- Before an SEA approves any joint funding, the SEA and LEA must design programs that take into consideration: 1) the special educational needs of all migratory children in the State who reside in areas of the State or LEA not served by Chapter 1 LEA projects; and 2) the needs of migrant children for support services that the Chapter 1 LEA Program does not provide.

- An SEA and an LEA may agree to use MEP funds to meet the special educational needs of migratory children who attend Chapter 1 LEA Program schools. However, if they do so, the SEA and LEA must ensure that any educationally deprived migratory children attending these schools -- whose special educational needs will not have been met with MEP funds -- will be eligible for Chapter 1 LEA Program services on the same basis as any educationally deprived non-migratory child.

These procedures may not be used as a means to discriminate against any migratory child in the provision of Chapter 1 LEA Program services.

Q10. In the implementation of joint programs, may Chapter 1 LEA and MEP funds be commingled, i.e., combined so that the funds lose their separate identities?

A. No. Sections 1201(a) and 1202(a)(1) of the Chapter 1 statute require that MEP program funds be used exclusively to provide services to migratory children.

Q11. In schools that have schoolwide projects under Section 1015 of the Chapter 1 statute, may MEP funds be combined, or otherwise commingled, with Chapter 1 LEA Program funds?

A. No. While Section 1015 of the Chapter 1 statute relieves an LEA that operates a schoolwide project of requirements regarding commingling of funds, it does not apply to the MEP. MEP funds may not be combined with Chapter 1 LEA Program funds in any way that would permit them to lose their separate identity or be used to benefit non-migratory children.

Q12. Does this mean that MEP funds cannot be used in schoolwide projects?

A. No. Provided that MEP funds are expended exclusively for the benefit of migratory children, they may be used in a schoolwide project. Indeed, these MEP-funded services should complement the services provided in the schoolwide project.

The Migrant Student Record Transfer System (MSRTS)

Q13. What is the MSRTS?

A. MSRTS is an acronym for the Migrant Student Record Transfer System, a national computerized telecommunication system that stores and transfers academic, health, and other education records and management information on migratory children for States and operating agencies on request. (See Section 1203(a)(2).)

Q14. Why was MSRTS developed?

A. The system was developed to provide timely academic and health information to school districts on migratory children who may enroll in different school districts as they migrate from one location to another within a State or between States.

Q15. When was the MSRTS developed, and what is the current legal authority for its administration and operation?

A. The MSRTS, developed jointly by ED and the SEAs, began operating in 1972. In 1978, Congress authorized ED to enter into a contract for the formal establishment of the MSRTS, and, in each reauthorization of the MEP, Congress has authorized ED to maintain the MSRTS contract. The current authorization is in Section 1203(a)(2) of the Chapter 1 statute.

Q16. How is the MSRTS funded?

A. ED funds the MSRTS by contract. Funds to support the contract come from an amount that is set aside from the annual MEP appropriation for Section 1203 coordination activities. (See Section 1203(a)(2)(A) and (b).)

Q17. Do all SEAs and operating agencies have a responsibility to participate in the MSRTS?

A. Yes. This is because both a State's level of funding and the level of services it provides to migratory children depend, in part, on the quality of MSRTS data that is (1) used to determine the FTE number of migratory children who reside in each State; and (2) included in students' academic and health records that are transferred between school districts. (See Sections 201.1(b) and 201.20(a) of the MEP regulations.)

Q18. What constitutes SEA and operating agency participation in MSRTS?

A. Participation means entering into the MSRTS, on a timely and accurate basis, the most current academic, health, enrollment, and withdrawal information available for all of the agency's migratory children. It also means entering into the MSRTS basic identifying and residency information on each migrant child that is used to generate, for funding purposes, the FTE number of migratory children residing in each State.

Q19. Should all the children identified and eligible in a State be entered in the MSRTS, or only those who participate in or are served by the State MEP?

A. Because State funding is based on the total number of migratory children who reside in the State, not the number of children who participate in the MEP, all migratory children in the State who have been identified and determined to be eligible for the MEP should be entered in the MSRTS. (See Section 201.20(a)(2).)

Q20. Does a child have to be entered in the MSRTS in order to receive MEP services?

A. No. To receive MEP services, the basis for a child's eligibility must be recorded on a certificate of eligibility (COE). (See Section 201.30 and Chapter V -- ELIGIBILITY.) Once this is done, the child may receive MEP services whether or not the child is entered into the MSRTS. However, the SEA and operating agency still retain their own responsibilities to transmit information on the child to the MSRTS. (See Q.18 of this chapter.)

Q21. What is the Family Educational Rights and Privacy Act of 1974 (FERPA) and how does it affect an education agency's decision to transfer a child's academic records to another education agency through the MSRTS?

A. FERPA (Section 438 of GEPA) is a Federal statute that establishes the rights of parents to examine and question the content of their children's school records, and restricts the transfer of school records without parental permission. It applies to any local operating agency that receives Federal funds. Under FERPA, education agencies that maintain education records of enrolled students may release these records to other school officials who have been determined to have legitimate educational interests, and to officials of other school systems in which the student seeks or intends to enroll, without the written consent of the parent. However, before transferring any records to another school system, the education agency must have adopted a written policy on the transfer of records. Parents annually must be notified of this policy, and it must be readily available to them. In addition, FERPA gives parents a right to be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record.

Q22. If the parent or guardian refuses to permit the transfer of a migratory child's records, does the refusal affect the child's eligibility for services?

A. No.

Q23. What types of "MSRTS-related" documents should the SEA retain for audit purposes?

A. An SEA should retain the following types of documents to demonstrate to a program monitor or auditor that (1) only eligible migratory children were counted or served by the MEP; and (2) the SEA fully performed its responsibility to participate in the MSRTS:

- certificates of eligibility (COEs). COEs must include information sufficient to establish the basis for the child's eligibility for the MEP as a currently or formerly migratory child.
- any other pertinent "MSRTS-related" documents that confirm the quality of the SEA's participation in the MSRTS, such as:

  (1) intermediate forms that are used between the time of completion of the MSRTS enrollment forms and actual transmittal of the information to the MSRTS;

(2) any other forms that are used to relay updated information through the data entry specialist to the MSRTS;

(3) the resulting MSRTS student records themselves; and

(4) any formal procedural instructions that are provided to project personnel or data entry specialists with respect to their use of the system.

Note: To the extent that any of these records can be obtained directly from the MSRTS, the SEA does not need to maintain duplicates. However, the SEA will be held responsible should they be needed and MSRTS is unable to provide them.

(See Sections 201.30(c)(1)-(2) and 80.42 of EDGAR.)

Q24. Does the information on migratory children entered in the MSRTS constitute information that is collected or sponsored by the Department?

A. No. The information that MSRTS collects is not subject to prior Federal review to ensure that the information collected is the minimum that is necessary under the MEP statute. (See Section 1203(a)(2)(D) of Chapter 1.)

Q25. May ED gain access to individual student records contained in the MSRTS, and may it grant permission for the use or release of MSRTS records and information to individuals or groups?

A. No. Under the terms of the MSRTS contract, ED does not have, nor can it grant, access to individual student records in the MSRTS. The decision to release information from the MSRTS must be made by the SEA and the operating agencies based upon established policies that govern the use of the data and privacy conditions. However, the Secretary and the Comptroller General of the United States, and any of their duly authorized representatives, have access to the records for audit purposes and examination. (See Section 437(b) of GEPA.)

Q26. What role does the MSRTS play in the identification and recruitment of eligible migratory children?

A. None. Each State is responsible for identifying and recruiting eligible migratory children for the program. The MSRTS is responsible only for the receipt, storage, and transfer of the data that the States provide. (See Section 201.30.)

Q27. What are the basic Federal, SEA, and operating agency responsibilities in the administration and operation of MSRTS?

A. As required by the statute, ED is responsible for contracting with an SEA to operate a system so that (1) records of migratory students may be transferred between States and operating agencies; and (2) the best data on the FTE number of migratory children residing in each State may be provided to the Secretary for State funding purposes. ED also negotiates contract terms that permit the MSRTS to generate various types of statistical information that are used by MEP officials at the local, State, and Federal levels. Once the contract is awarded, ED is responsible for monitoring the contractor's administration of the contract to ensure that the contract requirements are implemented in an efficient and effective manner. ED is also responsible for monitoring the SEAs' established policies and procedures to ensure SEA participation in MSRTS. (See Sections 1203(a)(2)(A) of Chapter 1 and 80.40(a) of EDGAR.)

SEAs are responsible for developing and implementing policies and procedures governing the identification and recruitment of eligible migratory children, entering accurate information into the MSRTS on the children's residency and project enrollment, and ensuring that accurate and complete academic and health information is transmitted in a timely and effective manner to the central MSRTS data bank so that it is available for transfer to other States and operating agencies upon request. These SEA policies and procedures must be consistent with information contained in an approved SEA application. (See Sections 1201(b) and 1202(a)(1) of Chapter 1 and Sections 201.1(b) and 201.30(c) of the MEP regulations.)

Operating agencies are responsible for implementing the SEA policies and procedures. (See Sections 201.1(b), 201.17(b) and 201.30(c).)

Q28. Can special education data on migratory children with disabilities be entered into the MSRTS?

A. Yes. However, under the present MSRTS process, the transfer of special education data is limited to a contact name, address, and telephone number at the previous location where special education services were provided to the child. Subject to compliance with the general requirements of the Family Educational Rights and Privacy Act (see Q21 of this chapter), another education agency may then directly contact the agency entering the information to arrange for the exchange of more detailed information regarding evaluation, individualized education programs (IEPs), and other information relevant to services the child may need. MSRTS transfer of special education data is limited due to the sensitivity of the records and the need to safeguard the privacy rights of children with disabilities. (See Sections 1203(a)(2)(A) of Chapter 1 and 201.1(b) of the MEP regulations.)

Section 1203 Coordination Projects

Q29. How do the requirements for coordination in Section 1203 of Chapter 1 differ from coordination required in Section 1202(a)(1) and (a)(2)?

A. Section 1203 directs the Secretary to award special grants or contracts to SEAs for activities that improve the interstate and intrastate coordination of educational programs available for migratory students. Section 1202(a)(1) and (2) contain general requirements governing interstate, intrastate, and interagency activities that each SEA must implement as part of its program and out of its regular MEP allocation.

Q30. For what period of time are Section 1203 grants and contracts awarded?

A. Except for the MSRTS contract, which beginning in 1992 is to be awarded for up to four years, each grant or contract is awarded for a period of up to three years. However, funds are made available only on an annual basis.

Q31. Does Section 1203 contain any required activities?

A. Yes. The Secretary must award a grant or contract to an SEA to develop and establish a national program of credit exchange and accrual for migratory students. In addition, under Section 1203, an award to support a Migrant Student Record Transfer System must be made as a contract rather than a grant.

Q32. How are other Section 1203 activities determined?

A. First, the Office of Migrant Education consults and seeks agreement with the States on the activities that might be carried out as grants or contracts under the Section 1203 authority. Then, the Department publishes a notice in the Federal Register of proposed grant priorities and solicits public comment. Finally, after review of the public comments, the Department publishes absolute priorities for the program and, depending on the amount of funds available, invites grant applications that respond to one or more of the priorities. Grant applications for Section 1203 activities must address the requirements in Part 205 of the regulations.

Q33. What is the role of the Program Coordination Centers (PCCs) in Section 1203 coordination?

A. The PCCs were established and funded under Section 1203 to strengthen the capacity of SEAs and LEAs to coordinate efforts designed to meet the educational needs of migrant children. The PCCs try to identify and resolve problems between State and local MEP projects and collect and disseminate information on exemplary programs and practices that improve the inter- and intrastate coordination of services. In consultation with the SEAs, the PCCs conduct MEP coordination activities between and among State and local MEPs, and any of the following: MSRTS, the National Association of State Directors of Migrant Education (NASDME), HEP Projects and CAMP Projects, the HEP-CAMP Association, other Section 1203 coordination projects, Migrant Education Even Start Programs, Chapter 1 Technical Assistance Centers and Rural Technical Assistance Centers, ED's Office of Migrant Education, and other Federal programs.

Q34. What types of coordination activities do the PCCs conduct?

A. Specific PCC coordination activities include: dissemination of curriculum materials; collection and dissemination of State-specific resource materials on available education and support services for migratory children; interstate workshops designed to overcome existing State barriers to the use of common curricula, assessment methods, standard graduation requirements and migrant child development activities; and help in developing or expanding interagency collaboration that can enhance the interstate or intrastate delivery of supportive services to migratory students.

Q35. Who may apply for Section 1203 grants or contracts?

A. Only SEAs are eligible to apply.

Q36. How much money may ED use to support Section 1203 activities?

A. To support Section 1203 activities, the Secretary is authorized to reserve not less than $6 million nor more than 5 percent of the total amount appropriated for the MEP under Section 1201.

IV. IDENTIFICATION AND RECRUITMENT

Identification and recruitment are critical activities because each SEA's MEP funding is based, in part, on its annual count of the full-time equivalent number of eligible migratory children, and children may not receive MEP services without this record of eligibility. The SEA is responsible for the identification and recruitment of all eligible migratory children in the State, including securing pertinent information for a Certificate of Eligibility (COE) which records the basis of a child's eligibility. In addition, the SEA is responsible for implementing procedures, as part of a system of quality control, that ensure the correctness of the information recorded on the COEs. Recording the basis of a child's eligibility on a COE is usually, but not necessarily, done through an interview with the child's parent or guardian. This chapter addresses the ways in which SEAs and operating agencies can meet their responsibilities for correctly identifying and recruiting all eligible migratory children in their States. Related issues about how children are determined to be eligible in the MEP are addressed in Chapter V -- ELIGIBILITY.

Statutory Requirements:

Section 1201(b)(1) and (2) of Chapter 1 of Title I, ESEA

Regulatory Requirements:

Sections 201.3 and 201.30

Q1. What do we mean by the terms "identification and recruitment" (I&R)?

A. Identification means determining the presence and location of migratory children. Recruitment means securing necessary information about each child, recording the basis of the child's eligibility on a COE, and entering the eligible child in the MSRTS. The SEA is responsible for the identification and recruitment of all eligible migratory children in the State.

Q2. Why is I&R an important and unique aspect of the Migrant Education Program?

A. Many migratory children would not fully benefit from school, and in some cases, would not attend school at all, if the SEAs did not identify and recruit them into the MEP. This is particularly true of currently migratory children who may be more difficult to locate than formerly migratory children but who have priority in receiving MEP services.

In addition, an active statewide I&R process underlies the SEA's responsibilities to:

- determine areas where migrant families reside (Sections 201.25(a) and 201.32(a)(1) and (5));
- determine areas of the State to be served (Sections 201.25(a) and 201.32(a)(1) and (5));

- oversee the State's and operating agencies' annual needs assessments (Section 201.32);
- serve migratory children according to their relative educational need (Sections 201.32(a)(5) and 201.36(a)(1)); and
- determine the types of services that are most responsive to the special educational needs of the State's migratory children (Sections 201.32(a)(6) and 201.36(a)(2)).

Q3. What methods or strategies should an SEA consider in meeting its responsibility to identify all eligible migratory children throughout the State?

A. Among the strategies that the SEA should consider are efforts to --

- identify and map the locations of agricultural and fishing areas throughout the State. The U.S. Departments of Agriculture, Labor, and Commerce, and the State Office of Employment Security, can assist in many cases.
- obtain and maintain current information on the State's agricultural and fishing activities, and determine for each (1) areas of the State in which concentrations of migratory labor exist; and (2) peak employment periods. Growers, the State Office of Employment Security, and the U.S. Departments of Labor or Agriculture may be able to assist.
- consult with officials administering the Women, Infants and Children (WIC), Migrant Health, Migrant Labor, Migrant Headstart, Community Service Block Grant, and other programs about the locations of migrant workers and families whom those programs serve.
- locate and maintain current lists of migrant housing in each area of the State. State and Federal Departments of Health (or Health and Human Services) and Labor may have lists of migrant camps. The lists that the SEA maintains should include housing that typically is used by migrants in towns and cities.
- determine, using these and other sources of information, what resources -- personnel and financial -- are needed to locate migrant families. The SEA might then develop and implement procedures to utilize all available resources (e.g., State and local officials, recruiters, parent advisory councils, Migrant Headstart, Migrant Labor, civic organizations, Migrant Health, etc.) to identify all eligible migratory children in the State.

- evaluate periodically the effectiveness of the State's identification efforts, and revise procedures as necessary.

Once the SEA successfully has used methods such as these, it might be able in succeeding years merely to update its information on the location of migratory children. It could do so, for example, through periodic spot-checks for changes in agricultural or fishing activities, housing patterns, or non-MEP program participation.

Q4. What are the SEA's responsibilities for statewide recruitment?

A. After identifying migratory children throughout the State, the SEA can recruit them as eligible for the MEP. In doing so, the SEA and its operating agencies are responsible for implementing procedures that ensure the correctness of the information used to determine that each child is a migratory child under the MEP definitions in Section 201.3. The SEA can meet this responsibility if it:

- implements a formal process designed to ensure the reasonable accuracy of written eligibility information;
- adequately trains and guides recruiters in practical and, to the extent possible, uncomplicated ways to implement the MEP's eligibility process;
- develops and implements procedures to utilize all available resources to identify and effectively recruit all eligible migratory children in the State;
- plans and implements a process to ensure the quality of its recruiters' eligibility decisions; and
- evaluates periodically the effectiveness of its recruitment efforts and revises procedures, if necessary.

Q5. What are the primary responsibilities of an interviewer/recruiter?

A. The recruiter's primary responsibilities are to (1) interpret information provided by parents, guardians, and others; and (2) record on a COE, accurately and clearly, information that establishes a child to be a currently or formerly migratory child under the regulatory definitions in Section 201.3. In all cases, the recruiter, rather than the parent or child, determines the child's eligibility on the basis of Federal regulatory definitions and policies that the SEA implements through formal procedures.

Because the SEA is responsible for all recruiter determinations of MEP eligibility, the information recorded should be specific enough to be understood by a knowledgeable independent reviewer. Information on what ED sees as appropriate for a COE -- what it should contain, how it should be completed, and the use of a comment section to explain information that otherwise would not be clear from the face of the COE -- is addressed in Chapter V - ELIGIBILITY and in the National COE Form and Instructions at the end of that chapter.

In order to work effectively, recruiters should have an adequate knowledge of:

- basic MEP eligibility requirements;
- local agricultural and fishing production and processing;
- languages spoken by migratory workers;
- cycles of seasonal employment and temporary employment;
- local growers and fishing companies;
- local roads and locations of places where migrants typically live;
- the MEP offered by the local operating agency;
- the local school system, and how recruitment of migratory children operates in that system; and
- other agencies that can provide services to migratory workers and their families, such as Migrant Health, Migrant Labor, WIC, and Migrant Headstart.

The process of recruitment through interviewing of migrant parents or guardians requires careful training, planning, cultural sensitivity, knowledge of the MEP, and excellent communication skills. See, L. Johnson, National Identification and Recruitment: Recruiter's Guide (1989), prepared by the Pennsylvania Department of Education under contract with ED.

Q6. How does information that a recruiter records on each eligible migratory child get entered into the MSRTS?

A. As each child is recruited into the program, information on the child is recorded on a COE. The school enrollment, eligibility, and residency information from the COE form is then forwarded to a data entry specialist employed by the State MEP who transmits the information to the MSRTS. Included in the transmission is a residency date which the MSRTS uses to calculate FTE credit for funding purposes.

Q7. Is the SEA required to implement a quality control system to ensure the correctness of recruiter's eligibility determinations? If so, what is meant by "quality control"?

A. Yes. Section 201.30(c) provides that "[t]he SEA and its operating agencies are responsible for implementing procedures that ensure the correctness of the information on which they and the MSRTS or other system rely." "Quality control" refers to the procedures that the SEA designs and implements for doing so. Without some type of quality control system, neither the SEA nor its operating agencies will have a reasonable basis for knowing whether the children who are recruited are, in fact, migratory children.

Q8. Why do the MEP regulations in Section 201.30(c) require that each SEA implement a quality control system?

A. The quality of a State's eligibility determinations is important both to programmatic decisions about who may and may not receive MEP services, and to fiscal decisions about the size of the State's MEP allocation. The regulations require each SEA to implement quality control procedures so that ED and the SEA have confidence in the information used to make both kinds of decisions.

Q9. Why should each SEA adopt quality control procedures?

A. First, these procedures will help the SEA ensure that its count of eligible migratory children is within the 5 percent error rate permitted by Section 1201(b) of the Chapter 1 statute. Second, they complement a system of identification and recruitment that, to the maximum extent possible, defers to thorough, reasonable, and consistent decision-making that recruiters should use when making MEP eligibility determinations. Finally, if these determinations are audited, the SEA's evidence that it has implemented quality control procedures can help to resolve audit concerns, as well as lessen the auditor's need to re-interview parents or guardians to determine whether the State's COEs contain accurate information.

Q10. What does ED consider to be the components of an acceptable SEA system of quality control?

A. A quality control system should include at least the following components:

- sound training for recruiters on various aspects of the job including:
  a. filling out all sections of the COE;
  b. MEP eligibility definitions, and appropriate ways to use them to determine a child's eligibility;
  c. the types of situations that need additional narrative or documentation, beyond what is normally recorded on the COE, to demonstrate that the children are eligible;
  d. the use of acceptable studies, if available, of the State's agricultural and fishing industries as guides for recruiters in determining whether a worker's employment may be in a temporary or seasonal agricultural or fishing activity;
  e. the decision-making process that recruiters should use, consistent with Federal definitions and SEA-adopted procedures, to determine each child's eligibility; and
  f. knowledge of local agricultural and fishing production and processing, local growers, processors and fishing companies, the MEP program offered by the local operating agency, and other factors as noted in Q.5 of this chapter;
- a designated reviewer for each COE to ensure that, based on recorded data, the child is eligible for MEP services and may be entered into the MSRTS;

- a formal process for resolving eligibility questions raised by recruiters and their supervisors, and for transmitting responses to all local operating agencies in written form;

- a process for reviewing, at least annually, completed COEs. This process should include:

  a. review by qualified individuals of all COEs for sufficiency of the written record or a similar review of a statistically random sample representative of the regions and types of migratory activities in the State;
  b. a process for corrective action, as needed, to eliminate the causes of insufficient information on COEs, and transmit appropriate corrections to MSRTS; and
  c. methods for reviewing with recruiters the basis for the information they recorded on or attached to COEs;

- apart from the on-going supervisory review of completed COEs (step 2), a plan for qualified SEA staff, or staff responsible to the SEA, to monitor at least annually, the identification and recruitment practices and procedures used by recruiters;

- documentation that supports the SEA's implementation of this process, and its records of actions taken to improve the system where periodic reviews and evaluations indicate a need to do so; and

- a process for implementing corrective action in response to internal audit findings and recommendations.

Q11. Must the supervisor who reviews each completed COE (step 2 in the above process) be a State official?

A. The SEA may select anyone (someone from the operating agency, a contractor, or an SEA official) to review COEs for sufficiency of the information used to determine eligibility provided that this person is qualified and understands the eligibility requirements in Section 201.3.

Q12. Does ED consider re-interviewing of parents and guardians who provided information to the recruiter originally to be a necessary part of an acceptable system of quality control?

A. No. However, re-interviewing can help ensure, in the case of an audit, that eligibility determinations are correct.

Q13. What special rules govern recruitment of migratory children at stopover sites?

A. The only special requirement governing recruitment at stopover sites is that, when a family is in transit to another State to seek employment, the recruiter must obtain the expected date of the child's departure from the stopover site. That departure date, typically one or two days after the child arrived at the site, must be recorded on the COE and reported to the MSRTS so that, under Section 201.20(a)(3), the State receives FTE residency credit only for the period that the child is at the stopover site in the State. If the child's family is in transit to a location within the stopover site State where employment will be sought, the SEA may enroll the child as a resident of the State. For those children, there are no special rules affecting recruitment at stopover sites.

V. ELIGIBILITY

Children who are currently migratory or formerly migratory, and have had the basis for their MEP eligibility properly recorded on a certificate of eligibility (COE), may receive MEP services. The terms "currently migratory child" and "formerly migratory child" are defined in Section 201.3 of the MEP regulations. According to those definitions, designation as a currently migratory child or formerly migratory child is based on whether or not a move was made within the past 12 months "to enable" the child or a member of the child's immediate family "to obtain temporary or seasonal employment in an agricultural or fishing activity." Determining whether these children meet these definitions often is difficult, and depends upon a recruiter's assessment of information presented by a parent or other family member, guardian, grower, or other individual. The Instructions to the National Certificate of Eligibility (COE) at the end of this chapter contain interpretations and procedures that ED has adopted for (1) determining whether a child meets the definitions in Section 201.3; and (2) recording necessary information on a COE.

The following information concerns aspects of MEP eligibility that are not included in the Instructions to the National COE.

Statutory Requirements:

Sections 1201 and 1202(b) and (c) of Chapter 1 of Title I, ESEA

Regulatory Requirements:

Sections 201.3 and 201.30

Q1. How do the MEP regulations define "children" in terms of the definitions of "currently migratory child" and "formerly migratory child?"

A. As defined in the MEP regulations, "children" means preschool children, and those persons up through age 21 who are entitled to a free public education through grade 12. Therefore, children who have graduated from high school or have obtained a GED are not eligible to be counted or served by the MEP.

Q2. How is a currently migratory child defined?

A. A currently migratory child is one whose parent or guardian is a migratory agricultural worker or a migratory fisher, and who moved within the past 12 months from one school district to another to enable the child, the child's parent, guardian, or a member of the child's immediate family to obtain temporary or seasonal employment in an agricultural or fishing activity. (See Section 201.3 for the special rule for States with only one school district, and the special exception for children of migratory fishermen who reside in very large school districts.)

A child of a parent or guardian who is a migratory agricultural worker or fisher is considered currently migratory and eligible for the MEP if, within the past 12 months, the child moved from one school district to another:

- with, or to join, a parent or guardian or another member of his or her immediate family who moved to obtain temporary or seasonal employment in an agricultural or fishing activity; or

- with, or to join, a parent, guardian, or member of the child's immediate family to enable the child to obtain temporary or seasonal employment in an agricultural or fishing activity.

In addition, a child of a parent or guardian who is a migratory worker is designated as currently migratory and eligible for the MEP if, without the parent or guardian:

- the child has moved annually to obtain qualifying employment after having previously been eligible under the above conditions.

Q3. Does this mean that teenage children of migratory workers, for example, may continue to be eligible for MEP services if they migrate without a parent or guardian at least once a year?

A. Yes.

Q4. Are there any differences between children who are eligible to receive MEP services and those who are counted for State funding purposes?

A. Yes. Children who can receive MEP services include any child, birth through age 21, who has met the definitions of a currently or formerly migratory child contained in Section 201.3. However, children may generate FTE credit for State funding purposes only if they are 3 years of age or over.

Q5. What is involved in a "move from one school district to another?"

A. A move from one school district to another involves a change of residence from one location, which may be either the migratory worker's permanent home or a temporary place of residence established while the worker is looking for employment, to a location in another school district.

Q6. Are there any special rules that affect moves of migratory fishers?

A. Yes. In attempting to determine a fisher's eligibility, it may be necessary to consider the fisher's boat as both a residence and a means of conveyance. Hence, for a fisher to be considered as having made a move, the worker must have moved his or her boat (residence) either across school district boundaries (to the extent that State law establishes boundaries on water) or at least 20 miles in school districts of more than 18,000 square miles.

Q7. What is a "qualifying move?"

A. A move is qualifying if:

- it is a move across school district boundaries;
- the worker, as a result of the move, is seeking or engaged in qualifying employment; or
- the worker or the worker's child moved to find qualifying work believed to be available, but upon arrival in the new location he or she found that it was not available and, consequently, either became unemployed or engaged in non-qualifying work; and
- the worker clearly did not move to the district for the purpose of relocating there on a permanent basis.

(See explanations of "Temporary/Seasonal Employment" and "Agricultural/Fishing Related Activity," items 14 and 15, in the Instructions for the National COE at the end of this chapter.)

Q8. May an SEA identify and recruit a child as currently or formerly migratory in the child's current State of residence based on a qualifying move that occurred in another state within the last six years?

A. Yes, if the interviewer can obtain a date on which the qualifying move occurred.

Note: The Instructions to the National COE refer to this date as the "Qualifying Arrival Date" (QAD). Formerly, this date commonly was known as the date of the last qualifying move (LQM).

Provided that the QAD was within the preceding six years, the child may be eligible for the remainder of the six-year period (up to one year as a currently migratory child and five years as a formerly migratory child). Often, the parent, guardian, or another responsible person will be able to provide the QAD for that family during the eligibility interview. At other times, a recruiter may be able to use MSRTS records to help identify when the most recent QAD occurred; an SEA Data Entry Specialist can make this inquiry of the MSRTS. In either case, the SEA must record the date and information on that move on a COE.

Q9. When is a child considered to be formerly migratory?

A. A child is formerly migratory if (1) in the 12 months since he or she was, or could have been, counted as currently migratory, the child does not make a subsequent qualifying move; and (2) his or her parent or guardian has given consent to having the child considered to be formerly migratory. A child may remain a formerly migratory child for up to five years after he or she last migrated. The COE used to record the reasons for determining that a formerly migratory child is eligible for the MEP must indicate the basis for concluding that the child met the definition of a currently migratory child in Section 201.3 at least once during the preceding six years.

Q10. Can a child, who has never been identified as a currently migratory child, be recruited as a formerly migratory child?

A. Yes, provided that the SEA records on a COE the basis for a determination that, during the preceding six years, the child could have qualified as a currently migratory child under the MEP definitions. In such a case, the child would retain MEP eligibility as a formerly migratory child for the remainder of the five-year period, or until he or she (1) is subsequently recruited as a currently migratory child; or (2) is no longer a "child." (See Q1 of this chapter.)

Q11. Sometimes, a child's eligibility status changes from "currently migratory" to "formerly migratory" in the middle of a project or school term. For the child to continue to receive MEP services during that school term, is it necessary to secure parental consent to change the child's migratory status?

A. No. An SEA may continue to provide services to the child for the remainder of the school term without obtaining permission from a parent or guardian to designate the child as formerly migratory. However, since the child is no longer currently migratory, parental concurrence should be obtained as soon as possible, and must be obtained before the child can receive MEP services during the following school term.

Note: A child in this situation should be classified as a currently migratory child for evaluation reporting purposes. (See Chapter XI - EVALUATION, Q26.)

Q12. To be considered a formerly migratory child, must a migrant youth who is no longer a minor under State law have the concurrence of a parent or guardian?

A. No. The parental concurrence requirement in Section 1202(b) of Chapter 1 provides migrant parents and guardians an opportunity to decide whether they want their non-migrating minor children to be considered as migratory. There is no reason to require parental concurrence when the child is no longer a minor -- that is, when, in the State in which the youth resides, he or she has reached the age of majority.

Q13. To be considered a currently migratory child, must every youth who is no longer a minor under State law (or is a legally married migrant youth of any age) have a parent or guardian who is or has been a migratory agricultural worker?

A. Yes. The definition of currently migratory child in Section 201.3 of the program regulations, which Section 1202(c) of the Chapter 1 statute requires ED to retain, provides that the child's parent or guardian must be, or have been, a migratory agricultural worker or a migratory fisher.

Q14. When does the 5 percent error rate mentioned in Section 201.30(d) and (e) apply to eligibility determinations?

A. The regulatory provisions provide that the 5 percent error rate applies only in the case of an audit of the eligibility of migratory children. This error rate was incorporated into the statute to ensure that an SEA is given some latitude in the correctness of the child eligibility decisions it makes in enrolling children in the program. The error rate applies to the numbers of children that the SEA itself enrolls into MSRTS.

ED considers both the SEA determinations, and the statistics generated by the MSRTS or other system on the FTE number of migratory children residing within the State, to be correct if the number of children whom the SEA or its operating agencies found to be eligible is within a 5 percent margin of error.

Q15. May a crew leader be considered a "guardian" for someone under 22 years of age who is working in the crew and has not finished high school?

A. Yes. A crew leader, or any other adult who will accept responsibility for the youth in place of his or her parent or guardian, may be considered to be a guardian as defined in Section 201.3.

Q16. Does the SEA have a responsibility to record, whenever possible, when a child leaves the State?

A. No. The only occasion in which an SEA must record the date of departure is when a recruiter at a special stopover site project that assists migrant families traveling to locations elsewhere learns that the child is traveling to a location in another State where a member of the child's family will seek employment. This information is needed so that the SEA can notify MSRTS of the child's expected date of departure, and so receive credit for the time the child was at the stopover site. (See Section 201.20(a)(3).)

Q17. Are there any special rules affecting the eligibility of children who are recruited at stopover sites?

A. No. The eligibility of all migratory children, whether recruited at stopover sites or not, is determined solely through application of the MEP definitions in Section 201.3. However, as noted in Q. 16, there are special rules governing the period of time that children recruited at stopover sites may be considered residents of the State in which the stopover site is located. (See also Chapter IV -- IDENTIFICATION AND RECRUITMENT, Q13.)

Q18. What is the significance of the special statutory references in Sections 1201(a) and 1202(b)(1) of Chapter 1 to children of "dairy workers?"

A. These statutory references emphasize that children of such workers are eligible to be counted and served by the MEP.

Q19. Are the children of migratory agricultural workers or migratory fishers eligible for MEP services if the children themselves do not move from one school district to another?

A. No. The MEP definitions provide that children must move before they can be eligible to be counted or served as migratory children under the MEP.

Q20. What is a "day-haul worker?" Are there circumstances in which the children of day-haul workers are eligible for the MEP?

A. A "day-haul worker" is a farmworker who travels back and forth between his residence and his agricultural or fishing job within the same day. By definition, this travel is a commute, not a migration, and so is not a "move" of a migratory agricultural worker or fisher as these terms are defined in Section 201.3. Therefore, children who accompany their parents or guardians in "day-haul" work do not qualify for the MEP on the basis of these trips. (See Qs 5, 6 and 7.) However, such children may be eligible to receive services under other Federal programs that serve children of migrant and seasonal farmworkers, e.g., HEP/CAMP, JTPA, and Migrant Health.

Q21. When should a recruiter provide an explanation of, or comments on, the eligibility information recorded on the COE?

A. A recruiter should add comments to a COE that clarify the reasons for his or her determination of eligibility so that anyone who later reviews the form can understand why the recruiter found the child to be eligible. The following are some of the circumstances that may need further explanation on the COE:

- a "move" is of such brief duration or for such a short distance, or both, that one could question whether any migration had occurred.
- the worker did not obtain qualifying employment as a result of the move.
- the worker's "activity" that is recorded on the COE could logically be part of a "series of activities" that, viewed together, would constitute permanent employment (e.g., mending fences and haying could be two parts of permanent ranching with one employer).
- the worker's recorded "activity" might be viewed by an independent review as either temporary or permanent employment (e.g., collecting eggs or milking cows).
- the recruiter has used the findings of an occupational or industrial survey to validate the eligibility determination.
- the recorded agricultural or fishing activity may be unusual enough that a reviewer is unlikely to understand that it is a qualifying activity.
- eligibility hinges on the agricultural or fishing activity as the worker's "principal means of personal subsistence."

Q22. Do all COEs have a comment section? What should recruiters do if the COE does not have a place to write comments?

A. The National COE and most COEs that SEAs use include a comment section. If a COE does not have a comment section, and an explanation is needed to clarify eligibility, comments should be attached to the original COE and maintained as a part of the official COE record.

Q23. Do COE comments need to be extensive?

A. No. However, the recruiter's additional comments must clarify the circumstances that led the recruiter to believe that the child is eligible in those cases where standard information may not clearly establish the child's eligibility. The recruiter's statement may be prepared in any way that the SEA specifies.

National Certificate of Eligibility (COE)

January, 1991

NATIONAL CERTIFICATE OF ELIGIBILITY

ECTION I: PARENT DATA

STATE: ______________________ SCHOOL DISTRICT: ______________________

A. FATHER'S NAME (LAST, FIRST):

2A. CURRENT MALE GUARDIAN'S NAME (LAST, FIRST):

. MOTHER'S NAME (LAST, FIRST):

2B. CURRENT FEMALE GUARDIAN'S NAME (LAST, FIRST):

. CURRENT ADDRESS:

3B. CITY:

3C. STATE:

3D. ZIP CODE:

ECTION II: CHILD DATA

NAME: LAST, FIRST, MIDDLE	5. SEX	6. BIRTHDATE	7. VERIFICATION	8. BIRTH PLACE CITY, STATE/COUNTRY

CTION III: ELIGIBILITY DATA - THE CHILDREN LISTED MOVED:

FROM: (SCHOOL DISTRICT/CITY, STATE, COUNTRY)

10. TO: (STATE OR SCHOOL DISTRICT)

11. ARRIVING ON (QAD): ______________________
QUALIFYING ARRIVAL DATE

THE CHILDREN MOVED ☐ WITH ☐ TO JOIN ☐ ON HIS/HER OWN

13. ☐ PARENT ☐ GUARDIAN ☐ OTHER FAMILY MEMBER ☐ CHILD

NAME:

TO ENABLE THAT PERSON TO OBTAIN OR SEEK:

☐ TEMPORARY EMPLOYMENT 15. ☐ AGRICULTURAL RELATED
☐ SEASONAL EMPLOYMENT ☐ FISHING RELATED

16. RESIDENCY DATE:

17. DEPARTURE DATE: (STOPOVERS ONLY)

18. STATUS

QUALIFYING ACTIVITY:

CTION IV: INTERVIEWER'S STATEMENT

HE ABOVE INFORMATION WAS OBTAINED FROM THE: ☐ PARENT ☐ GUARDIAN ☐ OTHER RESPONSIBLE PERSON ______________________
ND IS CORRECT TO THE BEST OF MY KNOWLEDGE.
NAME AND ASSOCIATION

The person identified in __________(1A, 1B, 2A or 2B) above has been informed of the Family Educational Rights and Privacy Act, the procedures of the school
rict and the Migrant Student Records Transfer System, and that these child(rens)'s records may be sent to other schools where they intend to enroll. If the
d(ren) cease to migrate, the parent or guardian gives permission for them to be classified as formerly migratory for the duration of the 5 year eligibility period.
person also knows that permission may be withdrawn at any time if so desired.

______________________________ INTERVIEWER'S SIGNATURE 23. ______________ DATE

CTION V: CERTIFICATION

ify that based upon the above information and applicable definitions, the child(ren) listed is eligible for the Migrant Education Program.

______________________________ FYING SIGNATURE 25. ______________ TITLE ______________ 26. ______________ DATE

STATE OPTIONS:

27. COMMENTS

ARTMENT OF EDUCATION OFFICE OF MIGRANT EDUCATION, MIGRANT EDUCATION PROGRAM

BEST COPY AVAILABLE

U. S. DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION
OFFICE OF MIGRANT EDUCATION
JANUARY 1991

MIGRANT EDUCATION PROGRAM NATIONAL CERTIFICATE OF ELIGIBILITY

Instructions for Completion

Development of a National Certificate of Eligibility (COE) was mandated by the Augustus F. Hawkins - Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988. The COE is a legal document used to explain the eligibility of each child who is enrolled in the Migrant Student Record Transfer System (MSRTS) and, therefore, generates funds for each State's Migrant Education Program (MEP). The COE must be completed by an individual authorized by the State education agency to recruit for the MEP. These instructions should be followed strictly to ensure compliance with Federal requirements governing Migrant Education Program eligibility and related matters. In this regard, items 1, 2, 3, 5, 7, 8, 18, 20, 21, 22, 23, 24, 25, 26, and 27 do NOT solicit information needed to meet Federal eligibility requirements, but rather information that would be gathered for quality control, MSRTS, program allocation, and administrative purposes.

GENERAL INSTRUCTIONS

The COE is designed to record on a single form all eligible children in a family who arrive on the same date in the State or district where they, or a parent, guardian, or other family member, obtained or sought qualifying agricultural or fishing work. A separate COE must be completed for each child of a family who has a --

1. Different Qualifying Arrival Date (QAD) (see definition in #11); or
2. Different Residency Date (see definition in #16).

Only eligible children are to be listed on the COE. If some of the children in a family are not eligible, do not list their names. Be certain to list children age birth through 21 who have not graduated from high school or obtained a general educational development (GED) certificate, whether or not the operating agency's MEP plans to serve them.

STATE OPTIONS

Unlike many State versions of certificates of eligibility, the National Certificate of Eligibility does not include such items as the child(ren)'s racial/ethnic group, the MSRTS student identification number, the child(ren)'s grade level(s), the family's telephone number, the employer's name, special services needed, etc., some of which are needed to satisfy other State and Federal program requirements. For this reason, the "State Options" block is provided on the right side of the COE. This will allow State programs to collect additional data on the COE without having either to re-interview the child(ren) or their families, or to use a separate form.

TOP OF FORM

State: Enter the name of the State where the child is identified if it has not already been stamped or pre-printed on the form.

School District: Enter the name of the school district where the child is now residing.

SECTION I: PARENT DATA

1A. ***Father's Name:*** Enter the biological or adoptive father's last name, then his first name.

1B. ***Mother's Name:*** Enter the biological or adoptive mother's last name, then her first name.

2A. ***Current Male Guardian's Name and Relationship:*** Enter the last and first name of the male (if any) currently responsible for the child(ren) and identify the person's relationship to the child(ren).

2B. ***Current Female Guardian's Name and Relationship:*** Enter the last and first name of the female (if any) currently responsible for the child(ren) and identify the person's relationship to the child(ren).

Note: If 1A is the same as 2A enter the word "same." If 1B is the same as 2B enter the word "same."

Use of the term "guardian" in this document means a legal guardian, member of the child's immediate family, crew leader, or any other person standing in the place of a parent to a child.

3A. ***Current Address:*** Enter the street, road, or mailing address where the child(ren) are currently residing.

3B. ***City:*** Enter the name of the city or town where the child(ren) are currently residing.

3C. ***State:*** Enter the State abbreviation used by the U. S. Post Office for the State where the child(ren) are currently residing. (See Appendix 1.)

3D. ***Zip Code:*** Enter the zip code, if known.

SECTION II: CHILD DATA

4. ***Name:*** Enter the name (last, first, middle name or initial) of each eligible child in the family who has the same QAD and residency date (#11 and #16, respectively).

5. ***Sex:*** Enter M for male or F for female.

6. ***Birthdate:*** Enter the child's date of birth. This requires a six digit entry for the MSRTS system; use 11/02/76, not 11/2/76 (month, day, and year).

7. ***Verify:*** Enter the letter that corresponds to the method used to confirm the child's birthdate:

B	birth certificate
D	document other than the birth certificate; e.g., baptismal certificate, parents' or midwife's affidavit, immunization record, school record
P	verbal confirmation by a parent or guardian listed in 1A, 1B, 2A, or 2B
O	other

Note: If you enter the letter "O" for "Other" provide clarifying information in the comment section (#27).

8. ***Birthplace:*** Enter the name of the city and State, (or country if outside the USA) where the child was born. Use only the two-letter abbreviation used by the U.S. Post Office for the State of birth. (See Appendix 1.)

SECTION III: ELIGIBILITY DATA

9. ***Moved From:*** Enter the city or town and State from which the child(ren) moved. This is the last place of residency before the child(ren), parent or guardian moved and then obtained or sought qualifying work. (Note that families may have made subsequent non-qualifying moves.)

If the most recent move was from a country outside of the United States, enter the country instead of the State.

[Note: If the country is other than Mexico or Canada, explain in the comments section of the COE (#27) the reasons for believing the move from that country to the new location in your State (#10) was made to enable the child(ren), parent, or guardian to obtain or seek temporary or seasonal employment in an agricultural or fishing activity. This move should not be confused with subsequent qualifying moves made after arrival at the first place of residence in the United States.

If the move was from one school district to another school district within the same city boundaries, also list the name of that school district. Enter the complete name of the city or town and either the full name of the State or the postal abbreviation. (See Appendix 1.)

10. ***Moved To:*** Enter the name of the State ***OR*** school district to which the child(ren) moved to enable the child(ren), parent, or guardian to obtain or seek qualifying work.

Note: The purpose of this entry is to confirm that the move was across school district boundaries. Therefore, for an ***interstate*** move (across State boundaries) enter only the name of the State to which the children moved. For an ***intrastate*** move (across school district boundaries in the same State), enter the name of the new school district.

11. ***Qualifying Arrival Date:*** Enter the date (month/day/year) the child(ren) listed on the COE arrived at the place (#10) where the qualifying worker obtained or sought employment. The qualifying arrival date (QAD) is not affected by subsequent non-qualifying moves.

- For ***interstate*** migratory children (children who moved from one State to another), list the date they arrived in the State; and
- For ***intrastate*** migratory children (children who moved from one school district or, if the State has only one school district, from one school administrative area to another) list the date they arrived in the school district or school administrative area.

Children who arrive on different dates must be listed on separate COEs. Also, the entry must consist of six numbers, e.g. 07/08/88.

12. ***With/To Join/On Own:*** Check "with" if the child(ren) made a move with a parent or guardian that enabled the child, parent, guardian or a member of the child's immediate family to obtain or seek qualifying agricultural or fishing work.

Check "to join" if the child(ren) moved on a date either before or after the date the parent or guardian made a move that enabled the child, parent, guardian or a member of the child's immediate family to obtain or seek qualifying work.

Check "on own" if the child made a move that enabled the child to obtain or seek qualifying work on his or her own. A child who has made a move "on own" also must have migrated on his or her own at least annually since the last time he or she moved with or to join a parent or guardian. (See definition of "currently migratory child" in Section 201.3 of the MEP regulations.) A child who has not previously migrated with or to join a parent or guardian, or who has had more than one year lapse between moves "on own," cannot qualify for MEP services by migrating on his or her own.

A crew leader or other adult who accompanies a child across school district boundaries, and who is willing to acknowledge responsibility for the child, can serve as the child's guardian for the purpose of the MEP. The child is eligible for the program as a currently migratory child on the basis of that move.

13. ***Parent/Guardian/Other Family Member/Child:*** Enter the name of the person who obtained or sought qualifying employment. Also check "parent," "guardian," "other family member," or "child" to indicate the qualifying worker's relationship to the child(ren) listed on the COE. In cases in which more than one person may be considered a qualifying worker, any one worker may be checked.

14. ***Temporary/Seasonal Employment:*** Check "temporary" when the employment is determined to be of a temporary nature. Check "seasonal" if the employment is seasonal. If "temporary," explain in the comment section (#27) of the COE how this determination was made. The move across school district boundaries must be to obtain employment in a new location.

Note: The following discussion of temporary employment will assist you in making this determination and in explaining it in the comments section (#27). Seasonal employment is also discussed.

Temporary employment is employment related to agricultural or fishing activities that is not permanent and that usually lasts no longer than 12 months. Temporary employment does not always have beginning and ending dates at particular times of the year. Mending fences, digging irrigation ditches, plucking chickens, and other activities not dependent upon a natural cycle of events may occur at any time, and be for any length of time. Therefore, these jobs may be either permanent or temporary.

In a wide variety of situations employment can readily be determined to be temporary or seasonal. Sometimes, however, while employment may be available to a worker on a year-round basis, the employment may still be temporary in the sense that, perhaps because of working conditions or intermittent periods of slack demand, the worker does not intend to remain at the job permanently, or otherwise is not likely to do so.

Any one or more of the following tests can be used to determine that an agricultural or fishing activity qualifies as temporary employment.

1) The activity itself has a clearly defined beginning and end (e.g., digging ditches, making packing boxes, building fences) and is not one of a series of activities for the same employer that is typical of permanent employment.

2) The employer establishes a time frame for completion of the worker's tasks.

3) An "industrial survey" that the SEA adopts pursuant to ED guidance establishes that, despite the apparent permanency of the work, the nature and history of the tasks are such that these jobs may be considered temporary. (See Appendix 2.)

4) The agricultural or fishing work might be permanent but the recruiter can detail specific reasons for believing that the worker does not intend to perform the tasks indefinitely.

To focus on the employment situation of the worker being interviewed, the interviewer should first determine on the basis of interviews whether the work is likely to be available on a year-round basis (items "1" and "2" above). Other information (tests "3" and "4" above) should be considered in any case involving a determination that a particular type of potentially year-round employment is temporary, and should be carefully documented so that the reasons for the determination can be readily understood.

Seasonal employment, whether agricultural or fishing, can easily be determined since it is an activity dependent upon natural cycles. In agriculture, for example, planting, cultivating, pruning, harvesting, and related food processing, etc. are seasonal activities. In commercial fishing, planting and harvesting of clams and oysters, fishing during seasonal runs of fish, and related food processing, etc. are seasonal activities. The production of meat and poultry may also involve seasonal activities; for example, turkey production increases significantly prior to Thanksgiving.

15. ***Agricultural/Fishing Related Activity:*** Check "agricultural" if it is an agricultural or agricultural related activity. Check "fishing" if it is a fishing or fishing related activity.

An agricultural activity is:

1) "any activity directly related to the production or processing of crops, dairy production, poultry, or livestock for initial commercial sale or as a principal means of personal subsistence" (34 CFR 201.3(b)(1)).

The "production" of crops, dairy products, or animals includes, among other things, planting, cultivation, or harvesting crops* or preparing land for such activities, raising or milking dairy farm animals, gathering eggs, and raising livestock for eventual slaughter (but not for sport or recreational use). Planting, cultivation, and harvesting fruits and vegetables (e.g., apples, oranges, grapes, tomatoes, potatoes, celery, etc.) are the major activities which employ migratory workers.

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*Crops--The following are examples of activities that involve the "production" of crops:

o Planting - oranges, apples, trees, catfish, oysters
o Cultivating - cotton, beans, onions, oysters
o Pruning - grapes, trees, hops
o Thinning - sugar beets, tomatoes, cotton
o Weeding - lettuce, tomatoes, celery
o Fertilizing - peanuts, apples, oranges, cotton, lettuce
o Irrigating - cotton, carrots, tomatoes
o Harvesting - picking or gathering of products, agricultural and fishing

In addition to foods and fiber, the term crop includes nursery plants, Christmas trees, flowers, turf, fibers and similarly grown items.

2) "Any activity directly related to the cultivation or harvesting of trees" (34 CFR 201.3(b)).

"Cultivation or harvesting" includes soil preparation, planting, tending, pruning and felling, Christmas tree cutting and bundling and planting of tree seedlings for restoration of forests. Normally, once the trees are ready to be transported from a harvesting site to a processor (sawmill), there is no longer a sufficiently direct involvement in cultivation or harvesting of trees. Therefore, the transporting of trees would not qualify as an "agricultural activity" (as per the program regulations). Moreover, the processing of trees (at the sawmill) cannot be considered as an "agricultural activity" within the meaning of the Chapter 1 regulations. (See Senate Report No. 95-561, 95th Congress, 2nd Session at 34 (1978).) Consequently, any activity directly related to the processing of trees would similarly not be an agricultural activity.

One exception to this rule concerns persons who transport the trees to the processor and who are employed by the same person or firm engaged in the cultivation or harvesting activities. This exception is a matter of convenience since in these situations it may be very difficult to differentiate among employees performing different kinds of work.

3) "Any activity directly related to fish farms" (34 CFR 201.3(b)(3)).

A "fish farm" is a tract of water reserved for the artificial cultivation of fish or shellfish, such as catfish, eels, oysters, or clams. The fish are artificially cultivated, rather than caught in open running water as they would be in a "fishing activity."

A fishing activity is:

> "...any activity directly related to the catching or processing of fish or shellfish for initial commercial sale or as a principal means of personal subsistence" (34 CFR 201.3(b)).

Note: With regard to definitions of ***"agricultural/fishing related activity"*** --

"Personal subsistence" includes both the worker's (and family's) direct personal consumption and incidental sale of the agricultural or fishing products.

Producing or processing a product for "initial commercial sale" may occur at the same site or at multiple sites. In isolated instances, the refinement process of a product may occur at the site where the product is produced.

"Processing" includes such activities as transporting to the processor, storing, refining, canning, and freezing. It also includes the processing of any part of a crop, dairy product or animal (e.g., cotton seed pressing that is performed after cotton ginning, or processing of animal organs). "Processing" ends at the point where the crop, dairy product, poultry, or livestock ceases to be recognized as the entity that began to be processed and becomes part of a more refined product--

potato soup, apple pie, macaroni and cheese, chicken pot pie, beef stew, etc., or when the product -- fresh packaged chicken, bagged grapefruit, boxed broccoli -- is readied for sale to the wholesaler or consumer.

"Initial commercial sale" occurs after the last processing stage of the product. Persons who own their own trucks, and who use them to perform work "directly related" to production or processing, are engaged in an "agricultural activity" for purposes of the Chapter 1 regulations.

Depending upon the circumstances, "initial commercial sale" can occur at the conclusion of the processing activity(ies), when the product or processed product is sold: (1) for refining to the next stage processor; (2) to the wholesaler; (3) to the retailer; or (4) directly to the consumer.

16. ***Residency Date:*** Enter the month, day, and year that the child(ren) entered the present school district. The residency date and the qualifying arrival date (QAD) would be the same only if the most current move enabled the worker in the family to obtain or seek qualifying agricultural or fishing employment. A subsequent move for a reason other than obtaining qualifying work would create a new residency date, but would not change the qualifying arrival date. The residency date is always the same as or after the date of the qualifying arrival date.

This entry must consist of six numbers for the MSRTS system; e.g., 04/01/89.

17. ***Stopovers Only, Departure Date:*** This section is to be completed ***only*** if migratory child(ren) pass through an established stopover center in transit to a location in another State. For stopovers, enter the month, day, and year that the child(ren) are expected to depart from the site.

18. ***Migrant Status:*** Enter the appropriate migrant status number from this list. Use the Arabic numbers 1 through 6 as listed, do not use Roman numerals.

1. Interstate Agriculture
2. Intrastate Agriculture
3. Former Agriculture
4. Interstate Fishing
5. Intrastate Fishing
6. Former Fishing

19. ***Qualifying Activity:*** Enter the name of the activity or series of activities that best describes the nature of the qualifying work. Be explicit enough to explain to an independent reviewer the basis for defining the activity as temporary or seasonal. If the activity is temporary, explain the basis for making that determination in the comment section (#27). If no qualifying employment was obtained, enter "N/A" (Not Applicable).

SECTION IV: INTERVIEWER'S STATEMENT

20. ***Information and Permission Statement:*** Enter the code 1A, 1B, 2A, or 2B to indicate the parent or guardian who has been informed: of the Family Educational Rights and Privacy Act (FERPA); of the procedures of the school district; of the MSRTS; that the child(ren)'s records may be sent to other schools where they intend to enroll; and that they will be classified as formerly migratory for the duration of the eligibility period unless permission is withdrawn.

    Note: While the verification about FERPA is not a requirement for eligibility, identification or recruitment, it is strongly recommended that the COE be used as the place to confirm that FERPA has been explained to the parent or guardian.

21. ***Parent/Guardian/Other Responsible Person:*** Check either "parent," "guardian," or "other responsible person" to identify the source of the information contained on the COE. If the interviewer checks "other responsible person," indicate the person's relationship to the child(ren) in the comment section (#27) of the COE.

22. ***Interviewer's Signature:*** The COE must be signed by the interviewer. The interviewer's signature verifies that: 1) the information is correct to the best of the interviewer's knowledge: 2) the parent or guardian has been informed about the MSRTS and the FERPA: and 3) the parent or guardian agrees to allow the child to be considered formerly migratory for the duration of the eligibility period unless permission is withdrawn.

23. ***Date:*** Enter the day, month, and year that the interview was conducted by the interviewer.

SECTION V: CERTIFICATION

24. ***Certifying Signature***: Enter the signature of the person the SEA has authorized to review the information on the COE and to certify that the child(ren) are eligible based on the material presented.

25. ***Title of Certifying Official:*** Enter the title of the person who is authorized to sign for certification purposes.

26. ***Date:*** Enter the day, month, and year that the authorizing official signed the COE.

COMMENTS SECTION

27. ***Comments:*** Enter comments concerning any information presented to the interviewer for which the entries on the COE are either unclear or need additional explanation. In order to identify the subject(s) of the comments, enter the number of the item and the letter (if appropriate) on the COE form before commenting on any line, space, or item. Any section of the COE may be the subject of comment. Use the back of the paper to provide additional information, if necessary.

The certifying official who later reviews the form must be able to understand why the interviewer found the child(ren) to be eligible. Therefore the interviewer will need to use the comment section of the COE to explain the reasons for the eligibility determination if the reasons are not clear from the information provided elsewhere on the COE. Circumstances that would need to be documented in this section include those where:

1. a "move" is of such brief duration or for such a short distance, or both, that it might be questioned as a migration, (e.g., intra-city or intra-town move that is across school district boundaries);

2. the worker did not obtain qualifying employment as a result of the move;

3. the worker's "activity" specified on the COE could logically be part of a "series of activities" that, viewed together, would constitute permanent employment (e.g., mending fences and haying could be two parts of permanent ranching with one employer);

4. the worker's specified "activity" might be viewed by an independent reviewer as either temporary or permanent employment (e.g., collecting eggs or milking cows);

5. the interviewer has used the findings of an industrial survey to validate the determination;

6. the agricultural or fishing activity is of a nature that a reviewer not familiar with the situation would not understand it to be qualifying;

7. eligibility hinges on the agricultural or fishing activity being the worker's "principal means of personal subsistence;" or

8. the worker's qualifying move is from a country other than Mexico or Canada to a first place of residence in the United States.

When any of these situations arise, the interviewer's comments need not be lengthy, but must clarify, for anyone who later reviews the document, the circumstances that led the interviewer to believe that the child was eligible.

The interviewer's statement may be prepared in any way that the SEA specifies. If the space available for comments on the COE form is inadequate, explanations should be continued on a separate sheet of paper and maintained as a part of the COE document.

APPENDIX 1

LISTING OF POSTAL ABBREVIATIONS

Alabama	AL
Alaska	AK
Arizona	AZ
Arkansas	AR
California	CA
Colorado	CO
Connecticut	CT
Delaware	DE
District of Columbia	DC
Florida	FL
Georgia	GA
Guam	GU
Hawaii	HI
Idaho	ID
Illinois	IL
Indiana	IN
Iowa	IA
Kansas	KS
Kentucky	KY
Louisiana	LA
Maine	ME
Maryland	MD
Massachusetts	MA
Michigan	MI
Minnesota	MN
Mississippi	MS
Missouri	MO
Montana	MT
Nebraska	NE
Nevada	NV
New Hampshire	NH
New Jersey	NJ
New Mexico	NM
New York	NY
Northern Mariana Islands	CM
North Carolina	NC
North Dakota	ND
Ohio	OH
Oklahoma	OK
Oregon	OR
Pennsylvania	PA
Puerto Rico	PR
Rhode Island	RI
South Carolina	SC
South Dakota	SD
Tennessee	TN
Texas	TX
Utah	UT
Vermont	VT
Virginia	VA
Virgin Islands	VI
Washington	WA
West Virginia	WV
Wisconsin	WI
Wyoming	WY

APPENDIX 2

INDUSTRIAL SURVEY

An "industrial survey" must be based on work-sites with employment practices that are comparable to the one at which the worker is employed, and must demonstrate a significant probability that the worker will leave the place of employment within a short period of time; for example, a 50 percent turnover rate in a 12 month period, a 60 percent turnover in 18 months, and a 75 percent turnover in 24 months. The survey should include a review of past employment records for evidence of a high degree of turnover, frequent layoffs without pay, a high incidence of part-time employment, or few or no opportunities for full-time employment. The survey must be updated by the SEA (or another agency) at least once every two years.

The SEA may wish to survey an agricultural or fishing industry within the State to establish a basis for determinations that employment at specific sites is "temporary." Specific businesses, at varying locations in the State, in the same agricultural or fishing activity, may have differing employment practices. If so, a single State industrial survey may not suffice and an individual survey may be needed. For any survey that is conducted, the survey record should include: "the industry," the names of companies surveyed, data relating to the duration of employment by type of job that was reviewed, the types of jobs or tasks that are considered temporary, and the rationale for the determinations that the jobs are temporary.

VI. PROGRAM SERVICES

Since the Chapter 1 statute now also emphasizes early childhood services and services to at-risk youth age 17-21, this chapter discusses the delivery of MEP services to these groups of migratory children, as well as to school-age children historically served by the MEP. Special attention is paid to issues that have surfaced since the enactment of the Chapter 1 statute, and issues that are related to other Federal laws or programs. Services to private school children are not discussed in this chapter but rather in Appendix F of the manual.

Statutory Requirements:

Sections 1201(b) and 1202(a), the basic objectives of Sections 1001, 1011(a), 1012, 1014 and 1018, Section 1471, and subpart 2 of Part F of Chapter 1 of Title I, ESEA

Regulatory Requirements:

Sections 201.3, 201.31, 201.32, 201.34, 201.36, 201.40, 201.43, 201.48, and 201.49
Sections 75.600 to 75.615, 76.600, and 80.42 of EDGAR

Services to School-Aged Children

Q1. What program services may be provided with Chapter 1 MEP funds?

A. Chapter 1 MEP funds may be used to 1) provide supplemental services that meet the special educational needs of migratory children at the preschool, elementary, and secondary school levels; and 2) help coordinate local migrant education projects with similar programs and projects in other States, including the transfer of school records and other information about eligible migratory children. Program services may be provided year-round and during the summer. MEP funds may be used only to pay for activities that the SEA has authorized and that are consistent with the approved State application. These activities may include the following (as well as other allowable activities):

- acquisition of equipment and instructional materials;
- acquisition of books and school library resources;
- employment of special instructional personnel, school counselors, and other pupil services personnel;
- employment and training of instructional aides;
- training of teachers, librarians, and other instructional and pupil services personnel;
- coordination with similar programs and projects in other States, including the transfer of school records;

- support services such as health, counseling, food and transportation;
- parental involvement activities;
- construction of school facilities, if necessary; and
- evaluation of MEP projects.

Q2. May migratory children who are not educationally deprived (defined by the Chapter 1 LEA Program as children whose educational attainment is below the level that is appropriate for children of their age) receive MEP instructional and support services?

A. Yes. Sections 1201 and 1202 of the Chapter 1 statute do not require that children receiving services under the MEP be educationally deprived. However, States must serve the migratory children who are in greatest need, based on an annual assessment of educational need. (See Section 201.32(a)(5).) Presumably, these children would include those who are educationally deprived.

The requirement to serve migratory children in greatest need, although broader in scope, is consistent with the policy and statement of purpose in Section 1001 of Chapter 1 -- to provide supplemental services to educationally deprived children to help them (1) succeed in the regular school program; (2) attain grade-level proficiency; and (3) improve achievement in basic and more advanced skills.

Q3. May MEP funds be used to provide instructional services for enrichment purposes -- for example, in music and art?

A. Yes, so long as these services enhance student performance in basic and advanced skills and are consistent with the needs assessment.

Q4. In the context of Section 201.17(b), what are "more advanced skills?"

A. The term "more advanced skills" is defined in Section 1471(13) of the Chapter 1 statute as "skills including reasoning, analysis, interpretation, problem-solving and decisionmaking as they relate to the particular subjects in which instruction is provided."

Q5. May the SEA and operating agency decide not to have an instructional program for currently migratory secondary school students if the needs assessment indicates that currently and formerly migratory children in preschool and elementary grades have significantly greater needs?

A. Yes.

Q6. May the SEA and operating agency decide not to have a program for preschool and elementary grades if the needs assessment indicates that currently and formerly migratory secondary school students have significantly greater needs?

A. Yes.

Q7. ***If a migratory child enrolls in school, may the operating agency ever use MEP funds to provide the same services that other children are receiving with State and local funds in the regular classroom?***

A. No. This would violate the "supplement, not supplant" requirements. (See Section 201.43 and Chapter IX -- MIGRANT EDUCATION PROGRAM FISCAL REQUIREMENTS.)

Q8. ***May Chapter 1 MEP funds be used to provide general aid -- i.e., any financial assistance used to operate the local school programs that benefit all children in a school, grade, or class, regardless of their eligibility for the MEP?***

A. No. Subject only to the rules governing the assignment of personnel to non-Chapter 1 duties and uses of equipment purchased with Chapter 1 funds, MEP funds may be used only for projects that are designed and implemented to meet the special educational needs of migratory children. (See Chapter X -- STATE ADMINISTRATION, the Equipment section, and Sections 201.40 and 201.49.)

Q9. ***Since MEP funds cannot be used for general aid, must migratory children be pulled out of the regular classroom for special supplemental services?***

A. No. ED neither requires nor encourages the use of pull-out programs. A variety of project designs meet the "supplement, not supplant" requirement without violating the prohibition against using MEP funds for general aid. (See Section 201.43.)

Q10. ***What are some acceptable project designs?***

A. As described in the Chapter 1 LEA Policy Manual, common project designs include in-class, extended pull-out, replacement, add-on, and limited pull-out models. If implemented properly, each model can conform to the "supplement, not supplant" requirement without using MEP funds for general aid.

Q11. ***What are the characteristics of an in-class project?***

A. An in-class project provides instructional services for participating children in the same setting and within the time period they would receive instructional services if they were not participating in the MEP project. An in-class project meets the "supplement, not supplant" requirement if--

- the project is designed to meet MEP participants' special educational needs;
- the classroom teacher who would be responsible for the provision of instructional services to participating children in the absence of MEP remains responsible for, and continues to perform, those duties the teacher would be required to perform in the absence of MEP, including planning the regular instructional program of participating children, providing them with instructional services, and evaluating their progress; and

- instructional staff members paid with MEP funds work closely with the classroom teacher, who is ultimately responsible for the provision of instructional services to participating children in the absence of MEP, so as to provide services that are designed to meet participants' special educational needs.

Example: An operating agency wishes to provide a special program of remedial instruction using a teacher aide for 10 high school juniors assigned to one business math class and for five high school sophomores in a separate compensatory mathematics class that meets at the same time. The teacher aide spends half of each class period in each class, working individually with MEP participants to provide tutorial assistance on an as-needed basis. Such a project satisfies the "supplement, not supplant" requirement if the classroom teacher, who would be responsible for providing instruction to the participating children in each case, continues to be responsible for tasks such as lesson planning and basic instruction, and meets with the teacher aide on a regular basis to ensure that the MEP participants are receiving a program of instruction that meets their individual needs.

Example: An operating agency wishes to provide a special program of remedial instruction for up to one hour per day to MEP students using the regular classroom teacher. Where normally a maximum of five teachers are required to be hired (for a 1:20 ratio) to instruct a particular number of students in one grade, six teachers are hired. Each of the six teachers is assigned a class in which about five students are MEP students. Each of the six teachers spend up to one hour per day providing MEP services exclusively to the MEP students in one section of the room while a volunteer or aide oversees the other students in another part of the room. For the portion of time the teachers spend with the MEP students exclusively, their salaries are charged to MEP. Collectively, the portions of time should equal one full-time equivalent (FTE) teacher's salary charged to MEP.

Example: An operating agency wishes to provide MEP services to MEP students for up to one hour per day using the regular classroom teacher in the regular classroom. For example, five regular teachers are provided by the operating agency to teach the students in one grade level for a five-hour instructional day. An additional teacher is hired to rotate among the five classrooms for one hour in each classroom and replace the regular classroom teacher for that period. During the time the rotating teacher is in a classroom, the regular teacher provides intensive instruction to MEP students to meet their special educational needs that is in addition to what they would receive if there were no MEP services. The rotating teacher takes over the regular program of instruction with the remaining students. Either the regular teacher's salary could be charged to the MEP for the portion of time the teacher spends solely with MEP students, or the salary of the additional teacher hired to rotate among the five classrooms could be charged to the MEP.

Both the second and third examples above would allow for smaller regular classroom loads and continuity in and maximum coordination of the MEP students' education. These examples would comply with the "supplement, not supplant" requirement if (1) for the time spent exclusively with MEP students, the regular teacher is formally relieved of responsibility for other students; (2) the proportion of the regular teacher's salary paid by MEP is equal to the actual portion of each regular teacher's total work day spent providing MEP services; (3) the MEP services are supplemental to the regular program, designed to meet the students' special educational needs, and the MEP students receive all services they otherwise would receive in the regular program; and (4) the regular teacher keeps time distribution records to show the actual time spent providing supplemental benefits for MEP students.

Q12. What are the characteristics of extended pull-out and replacement projects?

A. An extended pull-out project or a replacement project provides MEP services for a period of time that exceeds 25 percent of the time--computed on a per-day, per-month, or per-year basis--that a participating child would, in the absence of MEP funds, spend receiving instructional services from a particular teacher of a required or elective subject who is paid with other than MEP funds. An extended pull-out or a replacement project meets the "supplement, not supplant" requirement if the MEP services have all of the following characteristics:

- o MEP services are provided to participating children in a different classroom setting or at a different time than would be the case if these children were not participating in the MEP project;
- o the MEP project provides services that replace all or part of the course of instruction regularly provided to MEP participants with a program that is particularly designed to meet participants' special educational needs; and
- o the operating agency provides from funds other than MEP either the FTE number of staff that would have been provided for the services replaced by the MEP project or the funds required to provide the number of staff.

In calculating the FTE number of staff the operating agency must provide from funds other than MEP, the following principles apply:

1. If an extended pull-out or replacement project operates in more than one school, the appropriate staff to be provided from other than MEP funds must be determined in the aggregate for all the schools implementing the project.
2. If more than one extended pull-out or replacement project is implemented by the operating agency, e.g., one in mathematics and one in reading, the appropriate staff to be provided from other than MEP funds must be calculated separately for each replacement project.
3. The operating agency is not required to provide fractional parts of an FTE staff member for an extended pull-out or replacement project. However, the dropping of fractional parts of FTEs must be done for calculations across an entire extended pull-out or replacement project rather than on an individual school basis.

Elementary School (self-contained) - Example 1

This example pertains to an operating agency that has one school implementing a language arts replacement project.

Items to know before calculating the resources the operating agency is required to provide are as follows:

- the average class size for a full-time teacher in that school;
- the number of minutes per day a full-time teacher provides instruction;
- the number of children to be served by the replacement project; and
- the number of minutes per day that language arts is taught in the regular program.

Let the average class size be 25, the number of minutes a teacher teaches per day be 300, the number of students to be served be 75, and the number of minutes language arts is taught per day be 120.

- Calculate the percent of time per day that the students will participate in the replacement project by dividing the number of minutes the students will be served by the total number of minutes a day a full-time teacher provides instruction.

  $$\frac{120 \text{ minutes}}{300 \text{ minutes}} = .4 \text{ or } 40\% \text{ of a school day}$$

- Calculate the number of FTE students a teacher would teach for 40 percent of the day by multiplying that percent of the day by the number of MEP students to be served.

  75 MEP students x 40% = 30 students

- Calculate the number of FTE teachers to be provided by the operating agency by dividing the number of students calculated above by the average regular class size.

  $$\frac{30 \text{ students}}{25 \text{ students}} = 1.2 \text{ FTE teachers}$$

  Since the fractional portion of an FTE can be dropped, the operating agency must contribute resources equal to 1 full-time teacher.

Elementary School (self-contained) - Example 2

This example pertains to an operating agency that is going to implement a language arts replacement project and a mathematics replacement project in one school.

Items to know before calculating the resources the operating agency is required to provide are as follows:

- o the average class size for a full-time teacher in that school;
- o the number of minutes per day a full-time teacher provides instruction;
- o the number of children to be served by the language arts replacement project;
- o the number of children to be served by the mathematics replacement project;
- o the number of minutes per day that language arts is taught in the regular program; and
- o the number of minutes per day that mathematics is taught in the regular program.

Let the average class size be 25, the number of minutes a teacher teaches per day be 300, the number of students to be served in language arts be 75, the number of students to be served in mathematics be 40, the number of minutes language arts is taught per day be 120, and the number of minutes per day mathematics is taught be 70.

Language Arts

- Calculate the percent of time per day that the students will participate in the language arts replacement project, by dividing the number of minutes the students will be served by the total number of minutes a day a full-time language arts teacher provides instruction.

  $\frac{\text{120 minutes}}{\text{300 minutes}}$ = .4 or 40% of a school day

- Calculate the number of FTE students a teacher would teach for 40 percent of the day by multiplying that percent of the day by the number of MEP students to be served.

  75 MEP students x 40% = 30 students

- Calculate the number of FTE teachers to be provided by the operating agency by dividing the number of students calculated above by the average regular class size.

  $\frac{\text{30 students}}{\text{25 students}}$ = 1.2 FTE teachers

Mathematics

- Calculate the percent of time per day that the students will participate in the mathematics replacement project by dividing the number of minutes the students will be served by the total number of minutes a day a full-time mathematics teacher provides instruction.

$\frac{70 \text{ minutes}}{300 \text{ minutes}}$ = .233 or 23% of a school day

- Calculate the number of FTE students a teacher would teach for 23 percent of the day by multiplying that percent of the day by the number of MEP students to be served .

  40 MEP students x 23% = 9.2 students

- Calculate the number of FTE teachers to be provided by the operating agency by dividing the number of students calculated above by the average regular class size.

  $\frac{9.2 \text{ students}}{25 \text{ students}}$ = .37 (.368) FTE teachers

Total Resources the Operating Agency Must Provide

1.2 FTE language arts teachers
.37 FTE mathematics teachers

The operating agency must contribute resources equal to one full-time teacher, since the fractional parts of the language arts teachers and mathematics teachers can be dropped.

Secondary School - Example 1

This example pertains to an operating agency that has one school implementing a language arts replacement project.

Items to know before calculating the resources the operating agency is required to provide are as follows:

- the average language arts class size for a full-time teacher;
- the number of periods a day a full-time language arts teacher teaches; and
- the number of children to be served by the replacement project;

Let the average class size be 30, the number of periods a language arts teacher teaches per day be 5, and the number of students to be served be 300.

- A full-time teacher would normally teach 150 students per day.

  30 students x 5 periods = 150 students

- To calculate the resources the operating agency must contribute, divide the number of MEP students to be served by the number of students a full-time teacher would teach during the day.

$$\frac{\text{300 MEP students}}{\text{150 students}} = 2$$

The operating agency must contribute resources to equal two full-time teachers.

Secondary School - Example 2

This example pertains to an operating agency that has more than one school implementing an English replacement project.

Items to know before calculating the resources the operating agency is required to provide are as follows:

- the average districtwide English class size for a full-time teacher;
- the average number of periods a day a district English teacher teaches; and
- the number of children to be served by the English replacement project.

Let the average class size be 28, the number of periods an English teacher teaches per day be 5, and the number of students to be served by MEP be 60 students in one school and 80 students in another school, or a total of 140 students.

- A full-time English teacher would normally teach 140 students per day

  28 students x 5 periods = 140 students

- To calculate the resources the operating agency must contribute, divide the number of MEP students to be served by the number of students a full-time teacher would teach during the day.

  $$\frac{140}{140} = 1$$

  The operating agency must contribute resources to equal 1 full-time teacher.

Secondary School - Example 3

This example pertains to an operating agency that has one school implementing a mathematics replacement project. This mathematics replacement project will be conducted in the eighth and ninth grades. Teachers of ninth grade students are required to have larger classes than teachers of eighth grade students.

Items to know before calculating the resources the operating agency is required to provide are as follows:

- o the average mathematics class size for eighth grade teachers;
- o the average mathematics class size for ninth grade teachers;
- o the number of periods a day a full-time mathematics teacher teaches.
- o the number of eighth grade students to be served by the replacement project; and
- o the number of ninth grade students to be served by the replacement project.

Let the average eighth grade mathematics class size be 30, the number of periods a day a teacher teaches be 5, and the number of eighth grade students to be served by MEP be 75.

- A full-time teacher would normally teach 150 students per day.

  30 students x 5 periods = 150 students

- To calculate the resources the operating agency must contribute for the eighth grade portion of the replacement project, divide the number of MEP eighth grade students by the number of students an eighth grade mathematics teacher would teach during the day.

  $\frac{75}{150} = .5$

Let the average ninth grade mathematics class size be 35, the number of periods a day a teacher teaches be 5, and the number of ninth grade students to be served by MEP be 100.

- A full-time teacher would normally teach 175 students per day.
  35 students x 5 periods = 175 students

- To calculate the resources the operating agency must contribute for the ninth grade portion of the replacement project, divide the number of MEP ninth grade students by the number of students a ninth grade mathematics teacher would teach during the day.

  $\frac{100}{150} = .57$

Add .5 and .57 = 1.07 Since the operating agency may drop the fractional portion, it must contribute resources equal to 1 FTE staff.

Q13. What are the characteristics of an add-on project?

A. An add-on project provides MEP services at a time that participants would not be receiving State or locally funded instructional services, including periods such as study halls, before or after the regular school day, weekends, or vacation periods. The project meets the "supplement, not supplant" requirement if the project is designed to meet migrant students' special educational needs.

Q14. What are the characteristics of a limited pull-out project?

A. A limited pull-out project provides instructional services for participating children in a different setting or at a different time than would be the case if those children were not participating in the MEP project. Services are provided for a period of time that does not exceed 25 percent of the time--computed on a per-day, per-month, or per-year basis--that a participating child would, in the absence of MEP funds, spend receiving instructional services from teachers of required or elective subjects who are paid with other than MEP funds. A limited pull-out project meets the "supplement, not supplant" requirement if all of the following characteristics are met:

- the project is particularly designed to meet participants' special educational needs;
- the classroom teacher, who would be responsible for the provision of instructional services to participating children in the absence of MEP, remains responsible for, and continues to perform, those duties the teacher would be required to perform in the absence of MEP, including planning the instructional program of the participating children, providing them with instructional services, and evaluating their progress; and
- instructional staff members paid with MEP funds work closely with the classroom teacher, who is ultimately responsible for the provision of instructional services to participating children in the absence of the MEP, so as to provide services that are particularly designed to meet participants' special educational needs.

Example: Fifty third graders participate in an MEP project designed to help them improve their reading skills. All the children receive instruction in reading from their classroom teacher as part of their regular program of instruction. Under the MEP project, a special resource center is staffed by personnel paid with MEP funds; MEP participants are pulled out of class for one-half hour, five days per week to receive special assistance at the resource center. The time spent in the resource center totals 2.5 hours, or 12.5 percent of the 20 hours of instructional time the 50 participating children spend with their classroom teacher as part of their regular program of instruction. This project does not violate the "supplement, not supplant" requirement so long as the classroom teacher whose instruction the MEP project is designed to supplement continues to remain responsible for the program of instruction that is provided to the participating children and performs regular planning, instructional, and evaluative duties associated with those children. The classroom teacher must also work with those children and with the resource center personnel to ensure that a coordinated program of instruction is provided so as to meet the special needs of MEP participants.

Q15. How can an SEA determine, as required by Section 201.36(b), that a MEP project is of sufficient size, scope, and quality to give "reasonable promise of substantial progress toward meeting the special educational needs of the migrant children being served?"

A. The SEA may use such criteria as: 1) the number of migratory children to be served by the project; 2) the scope, extent, and range of services being provided by the project, and; 3) the quality of services to be offered as suggested by past evaluation results, to determine whether a project will be of sufficient size, scope, and quality. In doing so, the SEA must assess the needs of migratory children statewide, as required by Section 201.32, and ensure that the special educational needs of the children are sufficiently specific to permit the SEA to concentrate on meeting those needs. For example, if the SEA has a number of small scattered projects, with very little funding available for each one, they might not be of sufficient size, scope, and quality and therefore should not be funded. (See also Chapter I - STATE APPLICATION, Q11 and Q12.)

Q16. If currently migratory children are not served with MEP funds because their needs are met through other sources, such as the Chapter 1 LEA program, is the SEA required to maintain documentation that their needs are being met through these other sources? If so, what type of documentation should be maintained?

A. Yes. Consistent with the general recordkeeping requirements in Section 80.42 of EDGAR and the needs assessment requirements in Section 201.32(d) (which permits skipping of these children), the SEA must maintain documentation that the needs of these children are, in fact, being met through other sources. Among the records that should be maintained is the operating agency's needs assessment showing that these children do not have unmet needs that require MEP services, because their needs are being met through other programs. In addition, the SEA should have a record of 1) those migratory students who are receiving services through other sources; 2) the sources of funding which are being used to meet the unmet educational needs of these migratory students, (e.g., Chapter 1 LEA, bilingual education or State compensatory education funds); and 3) the services that the children are receiving under these other programs.

Q17. May MEP funds be used to train instructional and pupil services personnel, who are paid to work with the general school population, so that they can work more effectively with migratory children?

A. Yes, if the training is 1) specifically related to the MEP program and designed to help school personnel meet the special educational needs of migrant children rather than the general needs of the LEA, an entire school, or all children in a school or class; and 2) supplements, rather than supplants, State and local training.

Q18. May MEP funds be used to pay the cost of renting or leasing privately owned facilities for instructional purposes or office space?

A. The cost of renting or leasing space in privately owned buildings is allowable if the space is necessary for the success of the project, and if space in publicly owned buildings is not available to the grantee.

Q19. May MEP funds be used to construct school facilities?

A. Yes. Sections 1202(a)(1) and (3) and 1011(a)(2) of Chapter 1 specifically authorize the use of MEP funds, where necessary, to construct school facilities. However, the SEA and operating agency must be able to demonstrate that the proposed construction is essential to the success of the MEP, that every effort has been made to use other funds to pay for the construction, and that there is no alternative space that meets the needs of the MEP. (See also Sections 75.600 - 75.615 and 76.600 of EDGAR.)

Q20. May equipment be purchased with MEP funds?

A. Yes. Sections 1202(a)(1)and (3) and 1011(a)(2) of the Chapter 1 statute and Section 201.48(a) of the MEP regulations permit the use of Chapter 1 funds to acquire equipment. (See Chapter X - STATE ADMINISTRATION, the Equipment section.)

Q21. May MEP funds be used to purchase computers, including those for a home-based computer project for migratory children?

A. Yes. Computers, including those for home-based computer projects, may be purchased with MEP funds if the costs are reasonable and necessary and the computers will be used only to help meet the needs of migratory children. A home-based computer project, like a school-based computer project, should include both an instructional component, and an evaluation component. In addition, the operating agency should take steps to ensure that the computers are used only for their intended purpose.

Q22. May MEP funds be used to train personnel to implement a new program in a subsequent school year?

A. Yes, if this type of training is consistent with the SEA and operating agency's MEP application and annual State and local needs assessments.

Q23. Must the operating agency inform parents of the criteria for student selection and specific instructional objectives for each child served in the Chapter 1 MEP?

A. Yes. For further discussion of these requirements see Chapter VIII - PARENTAL INVOLVEMENT, Section 201.35 of the MEP regulations, and Section 200.34(b)(1) of the Chapter 1 LEA program regulations.

Q24. May a child be entered in the MSRTS but not be provided program services with MEP funds?

A. Yes. All migratory children should be entered in the MSRTS in order to be included in the State's count of eligible children, whether or not they need or receive MEP services. (See Section 201.20(a)(2).)

Q25. Do the program improvement provisions in Sections 1020 and 1021 of the Chapter 1 statute apply to the MEP?

A. No. They apply only to the Chapter 1 LEA Program.

Services to Preschool Children

Q26. Who are "preschool children?"

A. Section 201.3 of the MEP regulations defines "preschool children" as children who are below the age and grade level at which the agency provides free public education and of an age or grade level at which they can benefit from an organized educational program provided in a school or educational setting.

Q27. What is the SEA's responsibility for providing educational services for migratory preschool children?

A. The SEA is responsible for making appropriate provisions for the educational needs of preschool migratory children age three to five in the same way and according to the same priorities for services as it makes provisions for the needs of school-aged migratory children. This means that, if warranted by their needs assessments, the SEA and operating agencies must ensure that preschool migratory children have access to existing programs or, where no programs exist, that it or its operating agencies establish preschool programs that accommodate the needs of migratory preschool children.

Q28. The Chapter 1 LEA Program encourages, but does not require, LEAs to establish special preschool programs. On what basis does the MEP require SEAs to provide for the educational needs of preschool children?

A. Under the Chapter 1 LEA Program, LEAs are authorized to provide educational services to preschool children who are educationally deprived. (See Section 1011(a)(2) of the statute.) With regard to the MEP, the statute does more. Congress evidenced its intent that SEAs serve preschool migratory children by (1) enacting an MEP funding formula in Section 1201(b) of the statute that provides funding to States on the basis of their migratory children age 3 through 21, and (2) requiring an assurance in Section 1202(a)(5) that provision will be made for the preschool educational needs of migratory children. Congress elsewhere did not distinguish between the provision of services to school-age children and the provision of services to preschool children, i.e., Section 1202(a)(1) provides only that payments will be used for programs and projects which are designed to meet the special educational needs of migratory children.

Consequently, the MEP regulations require that, consistent with the service priority and needs assessment requirements in the statute and regulations, SEAs must give consideration to educational services for preschool migratory children. (See Sections 201.31 and 201.32 of the regulations.)

Q29. Did the same requirement regarding preschool migratory children exist under the former MEP statute?

A. No. Under the former statute, the SEA was only authorized to provide services to preschool children where these services did not detract from the operation of programs for school age children.

Q30. What factors does the SEA consider in designing projects for migratory preschool children?

A. In designing these projects, the SEA considers factors including:

- assessment of the needs of preschool children;
- whether there are enough children with unmet needs who reside in concentrations large enough to permit a project of sufficient size, scope, and quality to warrant the use of MEP funds for a preschool project;
- the availability of existing and appropriate preschool projects; and
- the extent to which existing projects meet the educational needs of preschool children.

Q31. Where no State or local preschool programs exist, must the SEA fill the need by providing preschool programs with MEP funds?

A. Lack of existing State or local preschool or child-care programs for non-migratory children does not relieve a State of its responsibility to make appropriate provisions for the needs of preschool migratory children.

Q32. May States and operating agencies use MEP funds to provide day care or babysitting services for currently migratory children age 2 years or younger who are siblings of preschool and regular school-aged currently migratory children?

A. Yes, if the provision of day care or similar services to these younger children is necessary so that migrant education services can be provided to their preschool and school-age currently migratory siblings, and no funds -- except MEP funds -- are available for that purpose. In this case, the currently migratory children age 2 years or younger would have a higher priority for services than would formerly migratory children. (See Section 201.31(b).)

Q33. What other programs exist to help migrant preschoolers make a smooth transition into the regular school program?

A. Depending on the community, various programs may help migrant preschoolers. Other Federally funded programs that address the goal of school readiness include the Chapter 1 LEA program, the Head Start program, Even Start, Reading is Fundamental (RIF), and the Migrant Health programs, which provide health-related services. In addition, some States and local communities have established their own preschool programs.

Q34. If existing preschool programs are available for both migratory and non-migratory children, must the MEP fund additional activities?

A. If the statewide and local needs assessments reveal that these existing programs are meeting the special educational needs of migratory preschool children, the SEA need not fund additional activities. Alternatively, if these programs are not adequate, then MEP funds must be used to meet the special educational needs of migratory preschool children. These additional activities must supplement and not supplant the existing program activities.

Q35. If the needs assessment indicates that the services provided by existing programs do not adequately address the needs of migratory preschool children, how might the MEP and existing programs work together to better address these needs?

A. Activities might include: increased coordination between the MEP and other programs; hiring supplemental staff; purchasing supplemental equipment and materials; and providing supplemental services. In the event that the MEP supplements existing programs with staff, equipment, or materials, the models and guidance provided in the "supplement, not supplant" portion of this manual apply. (See Chapter IX - MIGRANT EDUCATION PROGRAM FISCAL REQUIREMENTS.)

Special Populations

Q36. May children with disabilities be served in the MEP?

A. Yes. However, the MEP may provide special individualized services to migratory children with disabilities to permit them to participate fully in the MEP project only if (1) the State or operating agency is not already required by law to provide them; and (2) provision of these services is consistent with the State and local needs assessments. Sections 1014(d) and 1202(a)(3) of the Chapter 1 statute prohibit the use of MEP funds for services that school districts are otherwise required by Federal, State, or local law to make available for disabled children. The SEA and operating agency are required to provide appropriate services to disabled children under Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112, as amended), and the Individuals With Disabilities Education Act (IDEA) (P.L. 94-142, as amended).

In addition, Section 1202(a)(2) of the Chapter 1 statute and Sections 201.34 and 201.36 of the MEP regulations require that the SEA ensure that any MEP-funded services provided to children with disabilities are coordinated with those administered under the IDEA and other Federal programs.

Q37. Are there circumstances under which disabled migratory children must be served with MEP funds?

A. Yes. If the school district has met its responsibility as described above, then services must be provided to disabled migratory children to the same extent they are provided to non-disabled migratory children.

Q38. How can an operating agency provide MEP services for disabled children without violating the "supplement, not supplant" requirement?

A. An SEA and operating agency may provide services for disabled children that comply with the "supplement, not supplant" requirement if the MEP services have all of the following characteristics:

- o the operating agency designs the MEP project to address the special educational needs of migratory children, not needs relating to children's disabling conditions;
- o the operating agency sets overall program objectives that do not distinguish between disabled and non-disabled participants;
- o the operating agency selects disabled children for MEP services on the basis of special educational needs, not on the basis of disability, and the operating agency selects those disabled children who can be expected to make substantial progress toward accomplishing project activities without substantially modifying the educational level of the subject matter;
- o the operating agency provides the same services from non-MEP funds to address migratory children's disabling conditions as are provided for non-migratory children with disabilities;
- o the operating agency provides MEP services that take into account the needs and abilities of individual participants, without distinguishing generally between disabled and non-disabled participants with respect to the services provided; and
- o tThe operating agency provides for maximum coordination between MEP services and the services provided to address the children's disabilities in order to increase program effectiveness, eliminate duplication, and reduce fragmentation of the children's programs.

Q39. May MEP funds be used to provide services to disabled migratory children in an MEP summer school project if no other State and local programs are serving these children?

A. Yes, if neither the State nor the operating agency is required to serve these children during the summer from other sources of funds.

Q40. May MEP funds be used to provide bilingual education services to migratory children who are limited English proficient (LEP)?

A. Yes, under certain circumstances. Under Section 1014(d)(1) of the Chapter 1 statute, MEP services may not be used to provide services that the State or operating agency is required by law to make available to these children. Title VI of the Civil Rights Act of 1964 bars discrimination on the basis of race, color, or national origin in any program or activity receiving Federal financial assistance. Furthermore, the U. S. Supreme Court ruled in Lau v. Nichols, 414 U.S. 684 (1974), that Title VI requires that school districts offer LEP children meaningful opportunities to participate in the programs offered to other students. Therefore, whether or not the school district has an MEP project, it must offer programs to students with special language needs to enable them to participate meaningfully in school. School districts may not use MEP funds to meet their Title VI responsibilities.

MEP funds generally may be used to provide bilingual assistance to LEP students provided that 1) bilingual services are needed to enhance remedial instruction and not merely to permit the district to meet its Title VI responsibilities, and (2) language services are provided based on the assessment of unmet needs of all migrant children whom the SEA and operating agency might serve. If these conditions are met, MEP funds might, for example, be used to hire bilingual staff to augment efforts in assessing the needs of LEP children, or provide language assistance that is necessary to enable students to participate meaningfully in the MEP. If bilingual education services are provided with MEP funds, they must be remedial and supplement instruction offered by the school district's regular program. However, unlike the Chapter 1 LEA program, the MEP, in certain circumstances, may provide instructional and support services to children regardless of whether their needs stem from educational deprivation or limited English proficiency. (For more information on this subject, see the Chapter 1 LEA Program Policy Manual, Q18 and Q18A on pages 114 and 115.)

Q41. Must the SEA and its operating agencies serve children not legally admitted into the country (illegal aliens) to the same extent as children of U.S. citizens?

A. Yes. In the case of Plyler v. Doe, 457 U.S. 202 (1982), the U. S. Supreme Court ruled that the U.S. Constitution prohibits States from withholding financial support to school districts for the education of children not legally admitted into the country, or otherwise discriminating against these children by denying them access to educational programs offered to children of U. S. citizens.

Q42. May the children of undocumented workers, whether or not they have legal status, be denied admission to school because they cannot meet special State or local policies which require birth certificates or social security numbers as preconditions to school enrollment?

A. Typically, State laws require the provision of a free public education for all children who are residents of the State. Therefore, if an SEA or local school district denies admission to children of undocumented workers who reside in the State, it may be violating State law. Even if this is not so, the SEA and the school district could face legal challenges brought by migratory children and their parents who claim that such policies violate their constitutional rights to equal protection and due process of law.

Support Services

Q43. What are support services, and under what circumstances can they be provided with MEP funds?

A. "Support services" are non-instructional services that help migratory children to perform in an educational setting. They can include, among other things, medical care, dental care, transportation, student advocacy and counseling, family or nutrition services, day-care services, and clothing. An SEA or operating agency could use MEP funds to provide support services to migratory children when --

- o the needs assessment indicates that these services are needed to help migratory children participate effectively in their instructional or preschool program;
- o the SEA or operating agency has determined that funds or services from other programs are not available or are inadequate to meet the needs of participating migratory children; and
- o the services are provided to children consistent with the service priorities.

(See Section 201.25(c)(3) and 201.32(a).)

Q44. Must the SEA always provide support services as a part of the State's migrant education program?

A. No. However, the SEA must identify the special educational needs of migratory children who will participate in the program and design projects to meet those needs. If needs assessment indicates that these children need support services, then the SEA must provide them. (See Section 201.31.)

Q45. If a migratory child does not need remedial instructional services from the MEP (or any other source), can the MEP provide support services to the child?

A. Yes. A migratory child whose instructional needs are being met through other sources (e.g., State compensatory education programs, Chapter 1, bilingual education or the regular school program) may be provided MEP support services, such as guidance or health care, so long as these support services are based on the results of the needs assessment and are needed to ensure that the special educational needs of the children are being met.

Q46. May States and operating agencies use MEP funds to provide English instruction to the parents of migratory children?

A. Yes, but only to the extent that the English instruction is determined to be necessary and intended specifically to assist the migratory children to participate more fully in their instructional program.

Q47. Are "day care" services for children age 0 - 2, that are necessary to permit currently migratory preschool or school-age children to receive MEP education services, considered to be support services?

A. Yes. (See the Services to Preschool Children section of this chapter.)

Dropouts - At Risk Students

Q48. Are migratory students who are still entitled to a free public education eligible for services up to age 21, or through age 21?

A. Migratory children are eligible for services through age 21. (See Section 201.3.)

Q49. Where can information and reference materials be obtained to assist SEAs and operating agencies in designing programs that focus on dropout prevention and at-risk students?

A. Information on resources that are available may be obtained from the TACs, R-TACs, and PCCs, lists of which are available from ED upon request. Information is also available from the following organizations:

National Dropout Prevention Center
205 Martin Street
Clemson, South Carolina 29634-5111
(803) 656-2599

National Diffusion Network
Programs for Dropouts and At-risk Students
U.S. Department of Education
555 New Jersey Ave., NW, Room 500
Washington, DC 20208-5644
(202) 219-2116

Dropout Prevention Demonstration Program
School Improvement Programs
Office of Elementary and Secondary Education
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202
(202) 401-1342

Services to Private School Children

Q50. Must eligible migratory children enrolled in private schools be served by the MEP?

A. Yes. Under Sections 201.17(b)(3)(i) and 201.36(d) of the MEP regulations, SEAs and operating agencies must provide MEP services to all significant concentrations of eligible migratory children enrolled in private schools, consistent with the services priorities in Section 201.31. (See Appendix F for more Questions and Answers on Services to Private School Children.)

VII. SUMMER SCHOOL PROGRAMS

Summer programs play an important role in the MEP because they provide services that help migratory children compensate for gaps and disruptions in their education due to, or aggravated by, their frequent moves from one school to another. Summer programs and projects vary from place to place, depending on the results of the statewide and local needs assessments and the availability of other summer programs. The following addresses special rules governing summer programs.

Statutory Requirements:

Sections 1201 and 1202 of Chapter 1 of Title I, ESEA

Regulatory Requirements:

Sections 201.20, 201.30, 201.32, 201.35, 201.36, and 201.51 - 201.56

Q1. Why does the MEP emphasize summer program services?

A. Summer programs can offer critical services to migratory children by helping them earn high school credit, retain what they have been taught in the regular school program, and otherwise counter negative effects of dislocation and interrupted schooling.

Q2. Does the Chapter 1 statute contain provisions that focus on the need for MEP summer programs?

A. Yes. Section 1201(b) of the statute directs the Secretary to adjust, for MEP funding purposes, the FTE number of migratory children residing in each State "to take into account the special needs of those children for summer programs and the additional costs of operating such programs during the summer."

Q3. How does the Department make this special summer formula adjustment?

A. ED's present method is described in Chapter I - STATE APPLICATION, Q15 and Q19 of this manual.

Q4. Does the special summer formula adjustment apply to a summer project that begins before the end of the operating agency's regular school year?

A. No. Section 1201(b) of the statute, which authorizes the special summer adjustment and additional FTEs to States whose migratory children participate in summer programs, authorizes additional funding to States to meet the needs of migrant children during the summer period -- that is, when the regular school year is not in session.

Q5. Does this mean that States are prohibited from beginning summer projects before the end of the regular school year?

A. No. Depending on the dates of arrival and the children's needs, operating agencies may determine that migratory children would benefit from participation in such a project. However, these children may not begin generating summer FTEs for the State in which the project is located until the operating agency's regular school year has ended.

Because of "supplement, not supplant" requirements and the responsibility of SEAs and LEAs under State and local law to provide services to all children residing within school district boundaries during the regular school year, State and local agencies that begin summer projects before the school year ends must provide participating migratory children with the same level of State and locally funded services that they provide to children enrolled in the regular school year program.

Q6. Do the other MEP statutory provisions also apply to summer programs?

A. Except for Section 1202(b)(4) (which exempts summer programs from the requirement to establish parent advisory councils), all MEP statutory provisions apply both to summer programs and regular school year programs. Thus, the general provisions in Section 1202(a)(1), which require SEAs to use their MEP funds for activities that meet the special educational needs of migratory children, apply fully to migratory children with special educational needs who reside in the State during the summer months. (See Chapter II -- NEEDS ASSESSMENT and Chapter XI -- EVALUATION.)

Q7. Under what conditions may an SEA provide summer school programs paid fully with MEP funds?

A. The SEA may do so when no other services are available in a particular area to meet the needs of migratory children.

Q8. Are there any requirements regarding intensity of summer services, campus based instruction, student contact hours per day or days per week of instruction, etc., with which an operating agency must comply in operating a summer school program for migratory children?

A. No. Operating agencies have discretion in designing and implementing projects to best meet the needs and situations of their identified children. Effective instruction can take place in a variety of settings depending on the needs and situations of the children to be served. For example, an agency might choose to establish evening classes to meet the needs of secondary school students who work in the fields during the day to earn additional high school credit or to make up classes from the previous school year.

Q9. Are operating agencies required to establish a parent advisory council for summer projects?

A. No. The requirement to establish a parent advisory council for the MEP applies only to the regular school year program.

Q10. When operating a summer project, what must the SEA and operating agency do to meet the general parental involvement requirements in Sections 1016 and 1202(a)(4) of the Chapter 1 statute?

A. The operating agency must involve parents in the planning and implementation of summer projects. (See Section 201.35(c) of the MEP regulations and Section 200.34 of the Chapter 1 LEA Program regulations.) Such activities may include formal meetings, parent-teacher conferences, parents' day at the project, and other activities. (See also Chapter VIII - PARENTAL INVOLVEMENT.)

Q11. How can an SEA and an operating agency base a summer project on an assessment of the needs of currently migratory children when it has no advance information on the number of students who might need to be served during the summer months?

A. Section 201.32(a)(1) of the MEP regulations permits an SEA and its operating agencies to conduct needs assessments based on the characteristics of the children expected to reside in the area the project will serve. Agencies can rely on past experience with similar children who have moved to the area, MSRTS records, or other information to determine the characteristics of the children it expects to serve.

Q12. What requirements govern the evaluation design of instructional projects that operate in the summer?

A. The evaluation design for summer school instructional projects must include objective measures of the educational progress of students who participate during the project period, including educational achievement in basic and advanced skills over that period. The evaluation design must also measure the effect of any support services provided as part of the summer project. (See Sections 201.51(a), 201.52(c) and (d), and Chapter XI - EVALUATION.)

Q13. When evaluating summer projects, must agencies conduct pre- and post-testing using national or State normed achievement tests?

A. No. Because of the short period in which summer projects operate, it often is difficult to evaluate the effect of the project in terms of educational achievement. Therefore, in evaluating the educational progress of migratory students in summer projects (unlike in regular school-year projects), operating agencies do not have to conduct pre- and post-testing using national or State normed achievement tests. However, the evaluation design for summer projects must include objective measures of educational progress.

VIII. PARENTAL INVOLVEMENT

Section 1016 of Chapter 1 requires parental involvement as an integral part of all Chapter 1 programs, and Section 1202(a)(4) requires that Migrant Education Programs be designed and conducted in consultation with Parent Advisory Councils (PACs).

MEP regulations permit an SEA and operating agency to receive MEP funds only if they implement programs, activities, and procedures for involving parents of participating public and private-school migratory children in their migrant education programs. This involvement must include, but is not limited to, parental input into the planning, design, and implementation of the operating agency's MEP program.

This chapter addresses the various statutory and regulatory parental involvement requirements, including what State and operating agencies can and must do to involve migratory parents fully in the education of their children.

Statutory Requirements:

Section 1016 and 1202(a)(4) of Chapter 1 of Title 1, ESEA

Regulatory Requirements:

Sections 201.35, and 200.34 of the Chapter 1 LEA Program regulations

Relationship Between Parent Advisory Councils and General Chapter 1 Parental Involvement

Q1. What responsibilities do an SEA and its operating agencies have for involving parents in planning and operating their Migrant Education Programs and projects?

A. Except for State or local programs that do not extend for the duration of the school year, both the SEA and its operating agencies must design and implement their Migrant Education Programs and projects in consultation with parent advisory councils (PACs) that represent or include parents of migratory children. (See Section 1202(a)(4) of the Chapter 1 statute.) In addition, all State and local programs must comply with the general requirements for parental involvement in Section 1016 of the statute.

Q2. May an SEA and operating agency use an active PAC to meet any of the general Chapter 1 parental involvement requirements contained in Sections 201.35(c) of the MEP regulations and 200.34 of the Chapter 1 LEA Program regulations?

A. Yes. An active PAC may be an appropriate focal point of an agency's parental involvement efforts. These PACs may be used, for example, to:

- ensure full parental participation in MEP project planning, design, and implementation (Section 200.34(c)(1));

- convene an annual meeting of parents, at which school officials explain the MEP projects to be conducted (Section 200.34(c)(2)); and

- provide opportunities for regular meetings of parents to formulate parental input into these projects, if the parents so desire (Section 200.34(c)(4)).

To the extent that the SEA or operating agency relies on a PAC to assist in meeting some of its responsibilities for parental involvement (Sections 200.34 and 201.35(c)), it must ensure that the PAC operates in compliance with the specific PAC requirements in Section 201.35(b) of the MEP regulations since the general parental involvement requirements are independent.

Q3. Are there any general parental involvement requirements that cannot be implemented through a PAC?

A. Yes. For example, the requirements in Section 200.34(c)(3) of the MEP regulations, that school officials provide parents with reports on their children's progress and make teachers and other staff available to them for regular meetings, cannot easily be accomplished through PAC meetings, or other group sessions. These activities require contact with individual parents.

Q4. Must the MEP State plan include names of parents specifically involved in the planning, design, and implementation of the project?

A. No. However, operating agencies may wish to keep such records to ensure that they can demonstrate compliance with the requirements governing parental involvement in Sections 201.35 and 200.34.

Q5. Must parents be involved in the planning, design, and implementation of Migrant Education Programs that do not extend for the duration of the school year?

A. Yes. Although the SEA and operating agencies have no responsibility to maintain PACs for these programs, they must carry out the more general parental involvement requirements in Sections 201.35(c) of the MEP regulations and in 200.34 of the Chapter 1- LEA Program regulations.

Q6. Should the programs and activities developed for the involvement of parents provide help for parents who are not proficient in the English language so that they can understand and involve themselves in the operating agency's MEP projects?

A. Yes. Every effort should be made to facilitate the participation of parents in all aspects of programming, including, where practicable, training for parents who lack literacy skills or whose native language is not English.

Q7. How can teachers, other agency staff, and parents who do not speak the same language communicate their concerns about the students and their programs?

A. Information, programs, and activities for parents must be provided, to the extent practicable, in a language or form which the parents understand. As necessary, SEAs and operating agencies should employ bilingual personnel, including interpreters at meetings involving non-English speaking parents.

Q8. What strategies may the SEA and the operating agency use to involve working parents in educational concerns where those parents seem unable to participate in parental involvement activities?

A. SEAs and operating agencies must offer meaningful ways to involve parents in the programs and projects. Methods for parental involvement should be planned and implemented in ways that take into consideration the working hours and family responsibilities of the parents. In order to encourage greater attendance of parents, projects may use MEP funds to pay the costs of child care and transportation that parents incur to attend meetings, as well as refreshments at the meetings.

Parent Advisory Councils

Q9. What is the function of a parent advisory council (PAC)?

A. A PAC advises the SEA and its local operating agency on concerns of migrant parents that relate to the planning, operation, and evaluation of migrant education programs and projects in which their children participate. In addition, the SEA and operating agency must also consult with the PAC about: (1) the annual assessment of the needs of migratory children to be served; and (2) the design of the coming year's projects to meet those needs.

Q10. Before its application for MEP funds can be approved, what must the SEA and operating agency do to show compliance with PAC requirements?

A. The SEA and each operating agency that must have a PAC must document compliance with the PAC consultation requirements in the application for MEP funds. Neither the SEA's nor operating agency's application may be approved unless this documentation is provided. (See Section 201.35(b)(2).)

Q11. Are there any formal procedures and scheduling requirements that govern PAC meetings and undertakings?

A. The SEA and operating agency must establish procedures for consultation with the PAC in the planning, operation, and evaluation of each Migrant Education Program or local project. These procedures must also facilitate selection of a majority of PAC members who are parents (or guardians) of the migratory children to be served. Election to the local PACs should be conducted either by the agency or by parents (or guardians) of migratory children who attend the PAC meeting. The SEA might arrange for local PACs to elect members to the State PAC.

Q12. What should the SEA or operating agency do if election of PAC members is not possible?

A. To the extent feasible, members of the PACs must be elected by parents of eligible migratory children, but because of the mobility of the population and possible difficulties in obtaining active PAC membership throughout the regular school project year, elections may sometimes be impossible. Before deciding that elections cannot be conducted, however, the State or local operating agency must attempt to hold elections in consultation with parents and guardians of migratory children.

If elections are not possible, the SEA or operating agency should maintain records that include reasons why, as well as any contacts, discussions, and agreements with the migrant community on other methods of selecting PAC members -- for example, appointing volunteers or those nominated by teachers or by administrators. If it is necessary to obtain members by means other than elections, an explanation of why the alternative was selected should be circulated to all parents of migratory children and all interested parties. Whatever method is adopted, it should provide for maximum parent participation.

Q13. May MEP funds be used to pay the reasonable and necessary expenses that PAC members incur when attending PAC meetings?

A. Yes.

Q14. May MEP funds be used to compensate PAC parent members for lost wages incurred in attending PAC meetings?

A. Yes.

Q15. May MEP funds be used to pay expenses of PAC members who are not the parents or guardians of migratory children?

A. Yes. All participating members of the PAC, including teachers and other State operating agency personnel who have been chosen by the parents of migratory children, may receive compensation for their expenses.

Q16. What are the SEA and operating agency's responsibilities if they are unable, after diligent efforts, to maintain a functioning PAC due to lack of participation?

A. Those agencies should pursue all reasonable avenues of obtaining and reviving PAC participation before deciding that maintaining a functioning PAC is not possible. Since the MEP regulations (Section 201.35(b)(2)) require annual documentation of compliance with the PAC requirement, the State and operating agency should maintain records of their ongoing efforts to maintain a PAC.

Q17. To what extent must the SEA or operating agency consult with PACs in the planning, operation and evaluation of both the agency's MEP-funded preschool programs and its efforts on behalf of older youth not enrolled in schools?

A. Consultation requirements for these types of MEP projects are the same as for regular school-year projects involving school-age students.

Q18. Section 1202(b)(4) of Chapter 1 requires that PACs must be established only for "programs extending for the duration of the school year." Does this exempt summer school programs?

A. Yes, if the summer school program is separate from the agency's regular school year program. In areas with year-round programs of instruction, summer program activities occur within the "duration of the school year," and continuous PAC activities are required.

Q19. Are there situations in which an SEA or operating agency should consider operating PACs during summer months even though the regular school year has concluded?

A. Yes. Although establishing (or maintaining) a PAC is optional during this period, to the extent that an operating agency's summer project serves migratory children who were enrolled in the agency's regular school program, the agency should encounter few difficulties maintaining a PAC during the summer program period. In this situation, the agency should consider working with a summer PAC.

General Parental Involvement

Q20. What kind of parental consultation is required by Section 1016 of the Chapter 1 statute?

A. Section 1016 expands previous parental involvement requirements to emphasize parental consultation, training, and home-school partnerships. To meet the requirements of Section 1016, consultation with parents must be organized, ongoing, systematic, informed, and timely. Procedures for implementing these requirements must be documented with written policies that the SEA and operating agency make available to the parents and guardians of participating children. Parental involvement must be developed with, and based on proposed and final applications, needs assessment documents, budgetary information, evaluation data, local, State and Federal laws, regulations, policies and directives, and other information deemed necessary for effective involvement.

In addition, the MEP regulations require that the methods for obtaining full participation of parents must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward achieving the parental involvement goals contained in Section 200.34(b). (See Sections 201.35(c) and 200.34 (a)(3).)

Q21. What kinds of parental involvement activities does the Chapter 1 statue require?

A. Section 1016 of the statute requires, among other things, that each operating agency --

- o make MEP education and support service personnel, including pupil services personnel, accessible to parents;
- o convene a district-wide or building-level annual meeting of the parents of participating children and provide opportunities for regular meetings;
- o provide timely information to parents about the agency's MEP program and the progress of their children in school;
- o make parents aware of parental involvement requirements (including, where applicable, PAC requirements) and other relevant provisions of the program; and
- o provide information, to the extent practicable, in a language and form that the parents can understand.

An operating agency's parental involvement program must include activities such as (1) training parents to work with their children in the home and to understand program requirements; (2) training parents, teachers, and principals to build partnerships between home and school; and (3) training teachers, principals, and other staff members involved in the MEP program to work effectively with the parents of participating children.

Q22. Do all requirements for parental involvement contained in Section 200.34 of the Chapter 1 LEA Program regulations apply to the MEP?

A. No. Section 201.35(c) provides that paragraph (d) of Section 200.34, governing the operating agency's annual assessment of its parental involvement program, does not apply to the MEP.

Q23. How can the SEA and operating agency document that it has involved parents in the planning, design, and implementation of the MEP?

A. Parental involvement can be documented through such records as:

- o descriptions in the project application of the consultations with parents in the development and approval of the project;
- o agenda and minutes of the annual meeting of parents of participating children and other regular meetings of parents that are held to obtain input into the program;
- o schedules of training sessions designed for parents;

- financial records showing a budget and expenditures for parental involvement activities; and
- sign-in sheets from meetings and training sessions.

Q24. Must the operating agency's goals for parental involvement in MEP projects be addressed in the desired outcomes section of its project application?

A. While the operating agency may do so, it does not have to address its goals for parental involvement in desired outcomes.

Q25. What goals must parental involvement programs and activities be designed to achieve?

A. In coordination with parents of participating children, the SEA and each operating agency must develop programs and activities that are designed to achieve the goals listed in Section 200.34(b)(1)-(7) of the Chapter 1 LEA Program regulations. (See Section 201.35(c).) These goals include keeping parents informed about the services their children receive, supporting and training parents to understand program requirements and to work with their children at home, training school personnel to work with parents, and ensuring full participation of parents who are non-English speaking or who lack literacy skills.

Q26. Are both the SEA and the operating agency responsible for ensuring that the operating agency makes progress toward meeting these goals?

A. Yes.

Q27. What should an operating agency include in its written policies with regard to parental involvement in MEP projects?

A. An operating agency's written policies, which must be developed after consultation with and review by parents, should define --

- the procedures and types of activities for involving parents in the planning, design, and implementation of the migrant program;
- the specific goals of the operating agency for its parental involvement programs and activities; and
- the procedures and types of activities for parental involvement in program aspects other than in the planning, design, and implementation of the MEP (such as involving parents directly in the education of their children).

Q28. Must written policies be available to all staff and parents of participating children?

A. Yes. While the operating agency is not required to distribute copies of the written policies, it should make them available to interested staff and parents of participating children.

Q29. Must an operating agency provide copies of the law and regulations to each parent?

A. No. However, familiarity with these documents would enhance parents' understanding of program requirements and policies and would increase the effectiveness of parental involvement. At a minimum, copies of relevant laws and regulations should be made available to parents for review.

Q30. Must operating agencies inform parents of the criteria for student selection for MEP services and specific instructional objectives for each child?

A. Yes. An operating agency must ensure that the parents of participating migratory children are informed about the basis for selecting children for MEP services (including service priorities and needs assessments), the reasons why their children are participating, and the specific instructional or support service objectives of the program as well as the methods used to achieve them. In addition, an operating agency must provide the parents of participating children with reports on their children's progress and, to the extent practicable, conduct a parent-teacher conference with the parents of each participating child to discuss the child's progress and placement in the program, and methods parents can use to complement the child's instruction.

Q31. To meet the requirement of training "other staff" involved in the operating agency's MEP, should the agency train non-instructional personnel so that they can work effectively with parents of participating migratory children?

A. Yes. Both MEP and non-MEP funded staff members who are involved in the program should receive training to help them work more effectively with the parents of migratory children. These personnel include counselors, nurses, speech therapists, librarians, and social workers.

Q32. May MEP funds be used to support parental involvement activities required by the Chapter 1 statute?

A. Yes. The MEP regulations permit the use of MEP funds to pay the cost of Chapter 1 parental involvement activities. Activities such as the following are allowable: support of parent conferences; resource centers; training programs (including expenditures associated with attendance at them); reporting to parents on children's progress; hiring, training, and use of parental involvement liaison workers; training of personnel, including pupil services personnel; use of parents as classroom volunteers, tutors, and aides; providing school-to-home complementary curricula and materials and assistance in implementing home-based educational activities; providing timely information on the MEP and responses to parent recommendations; and soliciting of parents' suggestions in the planning, development, and operation of MEP projects. See Section 200.34(e) of the Chapter 1 LEA Program regulations (incorporated into Section 201.35(c) of the MEP regulations).

Q33. May MEP funds pay the cost of insurance for vehicles that transport school personnel for home visits or parents for school visits?

A. Yes. However, the portion of the insurance payment that is allowable should be calculated on the basis of the percentage of time that the vehicle is used for MEP home and school visits.

Q34. May MEP funds be used to pay for parents' attendance at training conferences?

A. Yes. An SEA and operating agency may use funds for costs that are reasonable and necessary to support the attendance of MEP parents of participating children at conferences specifically designed for them or at those conferences providing training to enable them to participate more effectively in the local program or to conduct home-based educational activities. The SEA and operating agency should develop criteria, in consultation with parents, to determine the reasonable number of parents who may attend national meetings. Upon return, attendees should provide information and, if possible, training on the conference topics to other migratory parents.

Q35. May parents be paid a wage or stipend to attend parental involvement activities or meetings?

A. No. The statute does not authorize an operating agency to pay wages to a parent to attend a meeting or training session, or to reimburse a parent for salary lost due to attendance at general parental involvement activities. But See Q14 of this chapter with regard to attendance of PAC members at PAC meetings. Parental involvement expenditures are limited to actual expenses that a parent may incur.

Q36. May MEP funds be spent for food and refreshments provided during parent meetings or training?

A. Yes. Reasonable expenditures for refreshments or food, particularly when such meetings extend through mealtime, are allowable.

Q37. May parents be paid as classroom aides and tutors?

A. Yes.

IX. MIGRANT EDUCATION PROGRAM FISCAL REQUIREMENTS

MEP funds may be used only to benefit migratory children; they may not be used to support projects of general aid to populations that include non-migratory children.

To ensure that Chapter 1 MEP funds are used to provide services to migratory children that are in addition to the regular services normally provided by an LEA or operating agency, two fiscal requirements related to the expenditure of regular State and local funds must be met by all operating agencies. The statute and regulations require that operating agencies: (1) provide services to migratory children with State and local funds that are at least comparable to services provided non-migratory children; and (2) use MEP funds to "supplement, not supplant" regular non-Federal funds. In addition, LEAs which are operating agencies must also maintain fiscal effort. This means that the LEA's per pupil expenditures or aggregate expenditures of State and local funds for free public education in the preceding year may not be less than 90 percent of the expenditures for the second preceding year. This chapter examines how these fiscal requirements affect the use of MEP and State and local funds.

Statutory Requirements:

Sections 1202(a)(3) and 1018 of Chapter 1 of Title I, ESEA

Regulatory Requirements:

Sections 201.40 through 201.45

Prohibition Against Use of Funds for General Aid

Q1. Are there circumstances in which an LEA or other operating agency may use MEP funds to serve children who are not migratory?

A. No. Under Sections 1201(a) and 1202(a) of the Chapter 1 statute, MEP funds may be used only for projects that are designed and implemented to meet the special educational needs of migratory children. Moreover, under Section 201.40 of the MEP regulations, using MEP funds to serve children who are not eligible for the program, or not selected through appropriately conducted annual needs assessments, violates the prohibitions against use of funds for general aid.

Comparability

Q2. What is comparability?

A. Comparability refers to the requirement that migratory and non-migratory children be treated consistently in the services that operating agencies provide with their State and local funds. Under Section 201.44 of the MEP regulations, an operating agency may receive MEP funds only if it uses State and local funds to provide services to children receiving MEP services that, taken as a whole, are at least comparable to services the agency provides to other students enrolled in the same grade levels of all its schools.

Q3. How does an operating agency meet the comparability requirement?

A. When an SEA subgrants to an operating agency, that agency meets the comparability requirement if it either: (1) files with the SEA a written assurance that it has established and implemented a district-wide salary schedule, a policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel, and a policy to ensure equivalence among students in the provision of curriculum materials and instructional supplies; or (2) establishes and implements such other measures for determining compliance as the SEA may approve. These other measures might include student/instructional staff ratios and student/instructional staff salary ratios. In either case, Section 201.44(c)(1) of the MEP regulations requires that the operating agency develop written procedures to ensure that comparable services are provided and that the procedures demonstrate that they will permit the agency to achieve comparability.

Because the purpose of the comparability requirement is to ensure that MEP students receive the same level of services from State and local funds as other students, these operating agency determinations should be made as early as possible in the school year.

Q4. What is the consequence of an operating agency's failure to meet the comparability requirements?

A. Under Section 201.44(f), if an operating agency is found to be out of compliance with the requirements, funds are to be either withheld from or repaid by the agency. Early determinations of comparability will preclude an operating agency from subsequently having to refund MEP funds due to noncompliance. In accordance with the authority for State regulations in Section 201.46 of the regulations, the SEA may establish timelines for comparability determinations and for implementing any required corrective actions.

Q5. How can an agency successfully plan to provide comparable levels of State and locally funded services to migratory students if it does not know when those students will arrive in or leave the area that it serves?

A. By using past enrollment information and making reasonable assumptions about likely demographic and local agricultural and fishing conditions, agencies can reasonably predict the numbers and grade levels of migratory students whom they will be expected to serve, and hence the ways in which they will have to allocate State and local funds in order to ensure comparability. In addition, Section 201.44(b)(2) of the MEP regulations provides that an agency does not need to consider "unpredictable changes in student enrollment or personnel assignments that occur after the beginning of a school year" (emphasis added).

Q6. What records should an operating agency maintain to document compliance with the comparability requirement?

A. If the operating agency files a written assurance that it has established and implemented a district-wide salary schedule and policies to ensure equivalence among schools in staff, materials, and supplies available to assist MEP and non-MEP students, it must keep records to document that the salary schedule and policies were implemented and that equivalence was achieved among schools in staff, materials, and supplies.

If the operating agency established and implemented other measures for determining comparability that were approved by the SEA, it must maintain source documentation to support its compliance with those measures. In either case, the operating agency must maintain annual records documenting compliance with the comparability requirement. (See Section 201.44(b)-(d).)

Q7. What are the SEA's responsibilities for monitoring the comparability requirement?

A. The SEA must monitor each operating agency's compliance with the comparability requirement, but each SEA has the flexibility to determine how best to carry out its monitoring responsibility. Proper monitoring could include reviews of the written procedures as required in Section 201.44(c) of the regulations, reviews of records maintained to document compliance, and on-site verification that comparable services are provided with State and local funds to children receiving MEP services. The SEA, however, is ultimately responsible for ensuring that its operating agencies remain in compliance with the comparability requirement. In addition, the SEA must withhold funds or require refunds from operating agencies that fail to comply with the comparability requirements.

"Supplement, not Supplant"

Q8. What does "supplement, not supplant" mean?

A. "Supplement, not supplant" is the phrase used to describe the requirement that MEP funds be used only to supplement -- and to the extent practicable, increase -- the level of funds that would, in the absence of MEP funds, be made available from non-Federal sources for the education of children participating in MEP projects. In no case may MEP funds be used to supplant (i.e., replace) funds from non-Federal sources. (For a discussion of a variety of instructional methods that meet the "supplement, not supplant" requirement, see Chapter VI - PROGRAM SERVICES, Qs 9-14.)

Q9. Does the "supplement, not supplant" requirement apply to the SEA or operating agency's use of MEP funds to serve migratory preschool children or older children who have dropped-out of school?

A. Only if either the SEA or the operating agency has a State or locally-funded program to serve these children in the area in which they reside. Otherwise, there are no State and local expenditures that MEP funds can supplement.

Q10. Does the "supplement, not supplant" requirement apply to the SEA or operating agency's use of MEP funds to serve disabled migratory children or migratory children of undocumented workers?

A. Yes. (See Chapter VI - PROGRAM SERVICES, Qs 36-42.)

Exclusion of Special State and Local Program Funds from the Comparability and "Supplement, Not Supplant" Requirements

Q11. What special State and locally funded services may an operating agency exclude when determining whether it has complied with the "supplement, not supplant," and comparability requirements?

A. An SEA and its operating agencies may exclude State and local funds expended for carrying out special programs to meet the special educational needs of migratory children when determining compliance with the comparability and "supplement, not supplant" requirements. Before funds for a State or local program can be excluded from the determinations of compliance with these requirements, the Secretary, or SEA respectively, must make an advance written determination that the program meets the following five requirements:

- all participants in the program are migratory children with special educational needs;
- the program is based on performance objectives related to educational achievement that are similar to those used in MEP programs and is evaluated in a manner consistent with those performance objectives;
- the program provides supplementary services designed to meet the special educational needs of the migratory children who are participating;
- the operating agency keeps, and provides access to, records that assure the correctness and verification of these requirements; and
- the SEA monitors program performance to ensure that these requirements are met.

(See Section 1018(d)(1)(B) of the statute and Section 201.45(b) of the regulations.)

Q12. Why may local or State funds expended on such State or local compensatory education programs be excluded from determinations of compliance with the "supplement, not supplant" and comparability requirements?

A. This exclusion allows State and local compensatory education funds to be used to further extend services similar to those provided by the MEP to migratory students without requiring such funds to be distributed equitably among migratory students receiving MEP services and those who do not. MEP funds may not provide students with services that these State or local program funds are required to provide.

Q13. How might special State and local compensatory funds be used with MEP funds for programs that meet the five requirements described in Q11?

A. If, for example, an agency's MEP project provides reading services in certain schools to migratory students in grades K-3 who performed at or below the 25th percentile on the reading portion of a standardized test, the State (or local) compensatory education program might:

- provide reading services at other schools to like students;
- provide mathematics services at other schools to migratory students who performed at or below the 25th percentile on the mathematics portion of a standardized test; and/or
- provide reading services at other schools to migratory students in grades 4-6 who performed at or below the 25th percentile on the reading portion of a standardized test.

Q14. When should advance determinations of exclusion of these special programs from comparability be requested?

A. Advance determinations should be requested of the Secretary or the SEA (as appropriate) before, or as soon as possible during, the project year for which such determinations are being made so that the local operating agency can meet its fiscal responsibilities and not incur penalties. (See Section 201.45(b) and (c).)

Q15. When demonstrating compliance with the "supplement, not supplant" requirement, may an operating agency also exclude State and local funds expended for bilingual education for LEP children, special education for handicapped children, and certain State phase-in programs described in Section 1018(d)(2)(B) of the Chapter 1 statute?

A. No. It may only exclude these funds for the purpose of demonstrating compliance with the comparability requirement. (See Section 201.45(a)(2).)

Maintenance of Effort

Q16. To what does the term "maintenance of effort" refer?

A. "Maintenance of effort" refers to the MEP regulatory requirement that an LEA's aggregate expenditures from State and local funds on free public education in the preceding fiscal year must be not less than 90 percent of its aggregate expenditures from State and local funds in the second preceding fiscal year. Section 201.41(b)(3) of the MEP regulations identifies those expenditures that must be considered when determining whether an LEA has maintained effort. This requirement applies only to LEAs.

Q17. If an LEA already has been determined to be in compliance with the Chapter 1 LEA program's "maintenance of effort" requirement, is it necessary for the SEA to redetermine that LEA's compliance for purposes of the MEP?

A. No. Because the "maintenance of effort" requirements for the MEP and Chapter 1 LEA program are identical, the SEA does not need redetermine compliance. (See Section 201.17(b)(5)(iii).)

Q18. Do "maintenance of effort" and "supplement, not supplant" requirements serve the same purpose?

A. No. "Maintenance of effort" requires maintaining the total level of an LEA's non-Federal expenditures from year to year while the "supplement, not supplant" requirement prohibits using MEP funds to replace State and local funds that the LEA or operating agency would be spending if it did not receive MEP funds. (See Sections 201.41 and 201.42.)

Q19. What consequences, if any, does an LEA face for failure to maintain the required level of fiscal effort?

A. The SEA must reduce, by 50 percent, the amount of the LEA's subgrant that may be charged to indirect costs under Section 76.563 of EDGAR. (See Section 201.41(b).)

Q20. Does the "maintenance of effort" requirement apply to subgrants that the SEA makes to either an institution of higher education or other private non-profit agency?

A. No. The requirement applies only to LEAs.

Q21. Is the SEA permitted to waive an LEA's "maintenance of effort" requirement? If so, under what conditions?

A. Yes. The SEA may waive an LEA's "maintenance of effort" requirement once, but only if doing so would be equitable because of exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the LEA. These circumstances do not include the results of tax initiatives or referenda. (See Section 201.42(a).)

X. STATE ADMINISTRATION

The Chapter 1 statute contains several new requirements that govern the SEA's administration of the State's Chapter 1 programs, including the MEP. For example, the SEA must convene a State committee of practitioners if it chooses to establish rules, regulations, or policies for the MEP. It also must establish formal complaint procedures to process and resolve complaints about the operation of the program anywhere in the State. However, because the MEP (unlike the Chapter 1 LEA Program) is both State-administered and State-operated, other State administrative requirements affecting the two programs differ. Limitations on State rulemaking that apply to the LEA program, for example, do not apply to the MEP unless the SEA chooses to delegate decisions to its operating agencies. Likewise, the Chapter 1 statute's limitation on carryover funds does not apply to the MEP.

This chapter addresses these and other significant administrative requirements under the MEP.

***Statutory Requirements*:**

Sections 1011, 1012, 1202, 1436, and 1451 of Chapter 1 of Title I, ESEA
Section 437(a) of GEPA

***Regulatory Requirements*:**

Sections 201.10, 201.16, 201.17, 201.18, 201.23, 201.25, 201.46, and 201.47
Sections 76.560, 76.561, 76.563, 76.730, 76.731, 76.734, and Part 80 of EDGAR

State Rulemaking

Q1. Does the Chapter 1 statute permit States to adopt their own rules in the MEP?

A. Yes. Section 1451(a)(1) of Chapter 1 provides generally that each State may issue rules, regulations, or policies so long as they are consistent with the provisions of the Chapter 1 statute, regulations, and other applicable Federal statutes and regulations.

Q2. Is the State free to issue any rules about the MEP that are consistent with Federal requirements?

A. Yes. Unless the SEA determines that LEAs or operating agencies have decision-making authority on issues related to planning, implementation, or evaluation of the MEP, the State may establish rules, regulations, or policies on any aspect of the MEP that do not conflict with Federal requirements.

However, the SEA may delegate decisions to the LEAs or operating agencies on (1) grade levels to be served; (2) basic skill areas to be addressed; (3) instructional settings, materials or teaching techniques to be used; (4) instructional staff to be employed (as long as such staff meets State certification and licensing requirements for education personnel); or (5) other essential support services. In this case, such decisions become LEA decisions, unless needed to implement SEA responsibilities in the approved State application or the

MEP statute or regulations, and the SEA may not issue rules, regulations, or policies that limit them. (See Section 201.46(b) and (c)).

In addition, a State that decides to issue rules, regulations, or policies that either govern the State's MEP or interpret Federal requirements must (1) formally involve a committee of practitioners in the State rulemaking process; and (2) identify these rules, regulations, or policies as State-imposed requirements. (See Section 201.46(d) and (e).)

Q3. In what ways must the SEA involve the committee of practitioners in rulemaking?

A. Section 1451(b) of Chapter 1 and Section 201.46(e) of the MEP regulations require the SEA to convene a State committee of practitioners to review any major proposed or final rule before publication, and also to ensure that the committee reviews all nonmajor rules before publication, but not necessarily in a meeting. For nonmajor rules, the SEA might, for example, solicit responses from committee members through the mail or by telephone. Additionally, if a State issues policies, rather than regulations, that the SEA and operating agencies are required to follow, the State must comply with the same consultation requirements for issuing rules and regulations.

An SEA may issue a major rule or regulation relating to the administration or operation of the MEP without consulting the committee of practitioners only in an emergency, when time constraints prevent consultation. However, the committee must be convened to review the emergency rule or regulation before it is published in final form.

Q4. When is a rule a major rule?

A. The determination of whether a rule is a "major rule" is a question of State law and practice. Examples of major rules are guidelines or policies that either require State School Board approval prior to either issuance or publication, or that the State determines would have a significant impact on operation or administration of the State MEP.

Q5. How are members of the committee of practitioners chosen?

A. Members of the committee are chosen under State procedures. Typically, SEAs will select the membership. The SEA is encouraged to solicit nominations for membership from organizations with an understanding of the MEP, as well as the culture and lifestyle of migrant children and their families.

Q6. What requirements govern composition of the committee of practitioners?

A. The committee must include administrators, teachers, school board members, parents, and representatives of private school children. Administrators include those from regional agencies, operating agencies, and boards of cooperative educational services, where applicable. A majority of committee members must be representatives of LEAs or other operating agencies, such as local administrators, teachers, and local school board members. There is no minimum or maximum number of committee members. (See 201.46(e)(3).)

Q7. Must the committee of practitioners review State rules issued prior to the enactment of the Hawkins-Stafford Amendments in 1988?

A. Yes. Any rules that impact the program must be reviewed by the Committee of Practitioners.

Q8. May members of the State Parent Advisory Council (PAC) be members of the committee of practitioners?

A. Yes. Since the committee must include parent representatives, it may be appropriate to have State PAC members join the committee of practitioners. However, the State PAC cannot be used as a substitute for the committee of practitioners. The committee serves a broader purpose and its membership differs from that of the PAC in that it includes operating agency representatives who represent local education concerns and the interests of local operating agencies.

Q9. May the MEP and the Chapter 1 LEA program use the same committee of practitioners?

A. Yes. The SEA MEP may use all or part of a committee of practitioners that has been empaneled to review rules or policies for the Chapter 1 LEA Program although, for purposes of reviewing MEP rules or policies, committee members should have familiarity with migratory children and the migrant education program.

Where committee members reviewing MEP rules or policies are also members of another Chapter 1 program's committee of practitioners, the SEA also should ensure that they understand (1) that the administration and operation of the MEP is the SEA's responsibility, not the LEA's as in the Chapter 1 LEA program; and (2) that decisions about rules and policies are made at the SEA level unless delegated to the local operating agencies.

Funds for State Administration

Q10. How is the SEA paid for the costs of administering the Chapter 1 programs, including the MEP?

A. Each year Congress appropriates approximately 1 percent of the total amount appropriated for the Chapter 1 programs to pay the State for the costs of administering the programs. Under Section 1404 of the statute, each State receives 1 percent of its total allocation for the programs or $325,000, whichever is greater. (Appropriation statutes may, as they did for fiscal years 1990 and 1991, provide a minimum amount greater than the $325,000.) An SEA must use these funds for its State-level administrative costs.

Q11. What types of MEP administrative costs must be paid out of the 1 percent administrative funds?

A. MEP funds may not be used to pay for general administration of the program; any administrative costs that are common to all Chapter 1 programs must be paid from Chapter 1 State Administration funds or State funds. Such costs include the following:

- design and distribution of forms required to operate the program, such as LEA applications, performance and financial reports, and evaluation reports;
- processing of project applications (but not necessarily the costs of reviewing them for compliance);
- review and aggregation of reported data;
- monitoring of projects for fiscal compliance with the requirements of EDGAR;
- maintenance of fiscal control and accounting procedures; and
- dissemination of information.

The SEA must comply with the recordkeeping requirements in Section 80.42 of EDGAR regarding expenditure of the 1 percent administrative funds. (See the Recordkeeping section of this chapter.)

Q12. What kinds of administrative costs incurred at the SEA level can be paid with MEP funds?

A. Whether or not the SEA decides to conduct all or part of the program itself, Section 201.48 of the regulations permits it to use MEP funds at the SEA level to perform those administrative functions that are unique to the MEP or that are the same or similar to those performed by LEAs in the State under the Chapter 1 LEA Program. In addition, if an SEA retains operational responsibility for the MEP, it may use MEP funds to pay for those activities that otherwise would be conducted at the operating agency level.

Indirect Costs

Q13. May indirect costs be charged to the MEP?

A. Yes. Indirect costs are allowable at both the State and operating agency levels. (See Section 201.23(b) and Sections 76.560, 76.561 and 76.563 of EDGAR.)

Q14. What is an indirect cost?

A. Fiscal accounting procedures classify the costs charged for all program components as either "direct costs" or "indirect costs." These terms have precise meanings in terms of salary, materials and supplies, equipment, utilities, and other kinds of expenses ("cost objectives") for which program funds may be charged.

Indirect costs are those that (1) have been incurred in the course of pursuing a common or joint purpose that benefits more than one cost objective; and (2) are not readily assignable to those cost objectives without an effort that is disproportionate to the benefits of doing so. They differ from direct costs which, because they can be identified specifically with a particular cost objective, may be charged directly to a particular grant or contract. While any cost conceivably could be charged to either a direct or indirect cost, those that might be charged to the MEP most readily as indirect costs include costs for electricity, janitorial service, refrigerator space, central computer use, and the air conditioning that an SEA (or operating agency) incur to operate a building in which many programs are administered.

To determine the amount that an agency may charge to its MEP grant as indirect costs, the agency applies an "indirect cost rate" to the total of its program expenditures. Under Section 76.561 of EDGAR, ED approves a rate for any SEA wishing to charge indirect costs to its MEP grant. Each SEA, on the basis of a plan that ED approves, then approves an indirect cost rate for each operating agency that requests it to do so.

Q15. Do MEP requirements limit the size of agencies' indirect cost rates?

A. Yes. Sections 201.2 of the MEP regulations and 76.563 of EDGAR provide that both SEA and subgrantees must apply a restricted indirect cost rate for their MEP grants. The "restricted" rate is lower than the general "unrestricted" rate because it is based on an exclusion of certain agency-wide costs that, because of the "supplement, not supplant" provision, cannot be charged to MEP funds. Sections 75.564 -75.568 of EDGAR describe how these restricted rates must be calculated.

Q16. Is there a limit on the amount of State administration funds that may be charged for indirect costs?

A. Yes. Sections 201.23(b) of the MEP regulations and 1404(b) of the Chapter 1 statute prohibit an SEA from using more than 15 percent of the total of its 1 percent Chapter 1 administrative funds for indirect costs.

Subgrants - Process

Q17. What are the SEA's basic responsibilities for operating the MEP?

A. Section 1201 of the statute provides that the SEA, upon approval of its application, is entitled to receive a grant to establish or improve, either directly or through operating agencies, education programs for migratory children of migratory agricultural workers which meet the requirements in Section 1202 of the statute. The SEA may subgrant the MEP's operations to LEAs or other operating agencies, and it has sole authority for determining which operating agencies, if any, are used to operate the program. However, the SEA is responsible for overall administration and operation of the MEP in the State.

If the SEA chooses to operate the MEP through subgrants to local agencies, it must ensure that those agencies comply with all applicable statutory and regulatory requirements. The SEA's approved application to the Secretary must contain an assurance to this effect, and the Department awards MEP funds to the SEA partly on the basis of this assurance. (See Sections 201.11 (b)(4) and 201.18.)

Q18. If the SEA chooses to operate the MEP through local operating agencies rather than directly, with what agencies may it subgrant?

A. The operating agencies eligible to receive a subgrant from the SEA to operate local migrant education projects are LEAs, public agencies, or nonprofit private agencies. (See Section 201.3.)

Q19. What is a subgrant?

A. A subgrant is an award of financial assistance, in the form of funds or property, made by the SEA, which is the grantee, to the operating agency. (A "grant" is an award of financial assistance by the Federal government to an eligible recipient). This is the case regardless of the label that the SEA places on the award of financial assistance to the operating agency. (See Section 80.3 of EDGAR.)

Q20. What must an SEA do before making a subgrant to an operating agency?

A. The SEA first must approve a subgrant application that the operating agency submits to the SEA. An SEA may approve a project application only if it (1) contains the information required by Section 201.17 of the MEP regulations; and (2) is consistent with the content of the SEA application that ED has approved.

The SEA also must determine, if the operating agency is an LEA, either that the LEA has met the requirements for maintained fiscal effort in accordance with Section 201.41 of the MEP regulation, or that the LEA's subgrant includes the required reduction in the amount of indirect costs that the LEA may charge to MEP funds. (See Section 201.18(a) and the section on Maintenance of Effort in Chapter IX -- MIGRANT EDUCATION PROGRAM FISCAL REQUIREMENTS.)

Q21. Is any LEA or other operating agency entitled to receive an MEP subgrant?

A. No. The SEA, at its option, can operate the MEP directly or through subgrants to operating agencies. The SEA determines which agencies or LEAs, if any, should receive a subgrant to operate migrant education projects.

Q22. How does an operating agency apply for a subgrant?

A. An operating agency that wishes to operate an MEP project must submit an application to the SEA. The application should be specific enough to allow the SEA to determine if the proposed project will satisfy the applicable requirements in the statute, MEP regulations, and the approved SEA application. After approving a subgrant application, the SEA must ensure that the operating agency's MEP project continues to comply with provisions of the approved SEA application. The SEA should direct subgrantees to amend any multi-year applications so that they are consistent with changes or amendments in the approved SEA application.

Q23. What specific information must an operating agency provide in its project application?

A. Under Section 201.17(b)(1), (2) and (5) of the MEP regulations, an application must include information that is consistent with the SEA's approved application regarding:

- the operating agency's separate annual assessments of the educational needs of its currently and formerly migratory children;
- the selection of children with the greatest needs to be served (consistent with the service priorities in Section 201.31);
- a description of the local MEP project to be conducted and how that project will meet the general instructional program goals the SEA has established. The description must contain:
  - a separate summary of the project's components that are designed to meet the unmet needs of the currently migratory children expected to be served; and
  - an estimate of the number of currently migratory children expected to participate in each component;
- a description of desired outcomes in terms of basic and more advanced skills that participating children are expected to master, and related support services the operating agency will provide;
- a budget for the expenditure of MEP funds that, to the extent possible, separately summarizes the estimated costs of project components that would benefit the currently migratory children the agency plans to serve; and
- information the SEA needs to ensure that --
  - the operating agency's project comports with activities described in the SEA's approved application;
  - the operating agency complies with all required assurances regarding adherence to general program requirements (see Q24 below); and
  - the operating agency, if it is an LEA, has maintained fiscal effort in accordance with Section 201.41, if such information is not otherwise available to the SEA.

Q24. In addition to the information described above, what assurances must an operating agency provide in its project application?

A. Under Section 201.17(b)(3) and (4) of the MEP regulations, an operating agency's project application must include assurances that:

- its projects will meet the requirements for parental involvement in Section 201.35 and the general program requirements in Section 201.36 of the MEP regulations. These general program requirements are that --
  - consistent with the service priorities, children selected for services are those with the greatest need as determined, to the maximum extent possible, using the educational criteria required by Section 201.32 (annual needs assessment);
  - the special educational needs of these children are sufficiently specific to permit the operating agency to concentrate on meeting these needs;
  - the size, scope, and quality of programs and projects are sufficient to give reasonable promise of substantial progress toward meeting the needs of the children being served;
  - the results of evaluations are used to improve the provision of services to eligible migratory children;
  - services are provided to all significant concentrations of eligible migratory children enrolled in private schools, consistent with the service priorities in Section 201.31 of the MEP regulations, and in accordance with the basic objectives of Section 1017 of the Chapter 1 statute (See Appendix F of the manual.);
  - time and resources are allocated for frequent and regular coordination of the curriculum under the MEP with the regular instructional program; and
  - for children with disabilities or children who are limited English proficient, that (1) there is maximum coordination between the MEP and other services that are provided to address children's disabilities or limited English proficiency, and (2) these coordination activities are designed to increase program effectiveness, eliminate duplication, and reduce fragmentation of services for migratory children.

In addition, the operating agency's application must contain the following:

- if appropriate, an assurance that the agency has established procedures to ensure comparability of services as required by Section 201.44; and
- the assurances required in Section 436(b)(2) and (3) of GEPA relating to fiscal control and fund accounting procedures.

Q25. Are these assurances necessary if related activities are described elsewhere in the application?

A. Yes. As noted above, under Section 201.17 of the MEP regulations these assurances must be included in the operating agency's application, and the application must contain information that the SEA needs to ensure operating agency compliance with regard to the assurances.

Q26. Must the operating agency's application consider the availability of funds or services from other sources when requesting funds to support MEP projects?

A. Yes. If funds or services are available from other sources, the expenditure of MEP funds would not be "necessary and reasonable for the proper and efficient administration of the grant program," and so would not constitute allowable costs under Section 201.2(a)(5)(ii) of the MEP regulations, Section 80.22 of EDGAR, and Office of Management and Budget (OMB) Circular A-87. Furthermore, to the extent that certain services are already available from State or local funds for children not receiving MEP services, failure to make these services available to migratory children participating in MEP projects would violate the "supplement, not supplant" requirements in Section 201.43 of the regulations. Also, since operating agencies must consider funds or services available from other sources in developing their needs assessments (Section 201.32(a)(6)), such funds or services also must be considered in developing the project proposal described in their subgrant applications under Section 201.17(b)(1).

Q27. Should the operating agency's application describe the funds and services that are available from other sources?

A. Yes. The SEA needs this information in order to properly determine the size of each operating agency's subgrant. (See Q40 and Q41 of this chapter.)

Q28. What is the effect of the SEA's approval of a subgrant application?

A. Once the SEA approves a subgrant application, the operating agency is required to administer and operate its project in accordance with its application and any amendments, and in compliance with all applicable Federal laws and regulations.

Q29. May an operating agency propose to respond to a critical need of currently migratory children if that need is not addressed in the approved SEA application?

A. No. A subgrant application must comport with the provisions of the approved SEA application. The operating agency has no authority to expend MEP funds on activities that are not addressed in the SEA's approved application. If for some reason, the SEA application does not authorize the local operating agency to meet the needs of currently migratory children, the SEA's application must be amended so that the SEA (and its operating agencies) receive permission to do so.

Q30. May an SEA give conditional approval to an LEA's application that does not meet all of the requirements of the statute and regulations?

A. No.

Q31. Who must be involved in the development of a subgrant application?

A. An operating agency's application, and any updating amendments, must be developed in consultation with parents and teachers of participating children. For projects that extend for the duration of the school year, this requirement includes specific consultation with the local PAC in the development of the project, including how any existing projects should be modified in view of the results of the project's evaluation and current needs assessment data.

The operating agency should also consult, as appropriate, with principals, regular school teachers of migratory students, early childhood specialists, librarians, and pupil services personnel.

Q32. May two or more LEAs enter into a cooperative arrangement to apply for a Chapter 1 MEP subgrant?

A. Yes.

Q33. Who designs the project application forms that an operating agency must use when applying for a migrant education project?

A. The SEA is responsible for all aspects of the application process, including design of project application forms.

Q34. What is the maximum project period that an application may cover?

A. An operating agency's application may cover a project period of not more than three fiscal years. However, the SEA may establish a shorter project period.

Q35. Does the SEA's approval of a multi-year application entitle the operating agency to MEP funds after the first year?

A. No. The SEA's approval of the application entitles the operating agency to a subgrant only for the first fiscal year. Even if the SEA wants to continue to fund the project in succeeding years, an annual update must be submitted for each succeeding year of the project. (See Section 201.18(b).)

Q36. If the number or needs of children to be served or the services to be provided changes significantly after the operating agency's multi-year application has been approved, can it continue to operate in future years without revising its application?

A. No. The operating agency must update its project application on an annual basis. That update must include the following:

- a description of any significant changes in the number or needs of children to be served or the services to be provided;
- maintenance of effort data (if not otherwise available to the SEA), if the operating agency is an LEA;
- a budget for the expenditure of Chapter 1 MEP funds; and
- other information that the SEA may request.

(See Section 201.17(c).)

Q37. What constitutes the kind of "significant change" that requires an operating agency to submit an updating amendment to the application?

A. SEAs and operating agencies have discretion in determining what constitutes "significant changes in the number or needs of children to be served or the services to be provided." Some examples of "significant changes" might be those that require budget modification, such as a large, rapid and unanticipated influx of eligible children; or major changes in program services, such as a change in the subject areas offered or the grade levels served by a program. Other changes in program services, such as a change in some of the instructional materials used, might not be considered a "significant change" unless it substantially affected the operating agency's MEP budget. (See Section 201.17(c)(3).)

Subgrants - Amount

Q38. Who is responsible for determining the amount of a subgrant to an operating agency?

A. The SEA has sole responsibility for determining amounts of subgrants.

Q39. May the SEA distribute funds to an operating agency solely on the basis of the number of migratory children residing in the area it will serve?

A. No. When determining the amount of a subgrant to an operating agency, the SEA must distribute funds based on the requirements in Section 201.25 of the MEP regulations.

Q40. How do the requirements in Section 201.25 ensure that the SEA distributes MEP funds in ways that give first consideration to the needs of all currently migratory children in the State?

A. Under Section 201.25 (a) and (b), the SEA must first consider the relative needs of all operating agencies in the State that would operate an MEP project in either the regular school year and/or the summer in terms of --

- the number of currently and formerly migratory children with identified special educational needs who reside within the area served by the operating agency in sufficient concentrations to warrant implementation of an MEP project; and

- the nature, scope, and cost of projects designed to meet the needs of currently migratory children as described in the operating agency's application.

Then, before distributing any MEP funds to pay for services to formerly migratory children, the SEA must ensure that each operating agency's subgrant will be enough to address the unmet needs of all significant concentrations of currently migratory children (and formerly migratory children in significantly greater need) residing in areas the operating agency serves.

Q41. Assuming that the SEA has determined that each subgrant will be enough to support appropriate activities for all significant concentrations of currently migratory children and those formerly migratory children in significantly greater need than the currently migratory children, how does the SEA determine the actual amount of each operating agency's subgrant?

A. Once the SEA has determined that each operating agency, whether operating a regular term or summer term project, will have sufficient funds to meet the needs of currently migratory children on a statewide basis, it then determines the size of each subgrant, using procedures it deems appropriate, based on --

- the total number of migratory children who either (1) are expected to be served by the project; or (2) are expected to reside in the area served by the agency that operates the project;
- the nature, scope, and cost of the proposed project;
- the availability of funds and services from other sources; and
- any other relevant criteria developed by the SEA, consistent with the service priorities in Section 201.31, including the SEA's priorities concerning ages and grade levels of children to be served, areas of the State to be served, and types of services to be provided.

Therefore, once the costs of both regular term and summer term projects for currently migratory children are fully considered, and provided that MEP funds are not used to duplicate services already available and are used for reasonable and necessary costs of the program, the SEA may distribute funds based on a head count formula.

Q42. May an SEA use separate operating agency applications for regular school year and for summer school projects so that it can determine the cost of serving currently migratory children during the summer more effectively?

A. Yes. The SEA is free to establish whatever application process it wants to fund operating agencies.

Complaint Procedures of the SEA

Q43. Must an SEA adopt procedures for resolving complaints about the way in which the State's MEP is operated?

A. Yes. An SEA is required to adopt written procedures for receiving and resolving any complaint that an SEA or operating agency is violating a Federal statute or regulation that applies to the MEP. These written procedures must include procedures for reviewing an appeal to a decision of an operating agency and for conducting an independent onsite investigation of a complaint, if the SEA determines that one is necessary. (See Section 201.47)

Q44. Are there specific issues that the complaint procedures must address?

A. Yes. At a minimum, the SEA's complaint procedures must include the following:

- a time limit of 60 calendar days after the SEA receives a complaint to carry out an independent on-site investigation and to resolve the complaint;
- an extension of this time limit only if exceptional circumstances exist with respect to a particular complaint; and
- the right to request that ED review the SEA's final decision.

Q45. What must be included in a complaint to the SEA?

A. A complaint must include (1) a statement that the SEA or operating agency has violated a requirement of Federal statute or regulations that applies to the MEP; and (2) the facts on which the statement is based.

Federal and State Monitoring

Q46. Under what authority does ED monitor State MEPs?

A. ED monitors programs under the general administrative authority of the Department of Education Organization Act. In addition, Section 80.40 of EDGAR specially permits ED to make site visits as warranted by program needs.

Q47. What areas may a Federal program review cover?

A. ED's review of a State's MEP normally will be conducted at both the SEA and selected operating agencies and typically will cover three areas:

- compliance with applicable Federal laws, rules and regulations, and with the approved State plan;
- identification of exemplary programs and projects; and
- potential need for technical assistance.

Q48. May ED's program monitors cite an SEA for non-compliance with MEP requirements or the approved State plan?

A. Yes. The SEA, as the grantee, is responsible for implementing its program as approved by ED. Any failure to adhere to the provisions of the approved State plan may expose the SEA to a finding of noncompliance. This could result in the need for either corrective action or a monetary refund. (See Section 452(a) of GEPA.)

Findings by program monitors involving the MEP at any level of the State program cite the SEA. Similarly, ED looks to the SEA for any problems of noncompliance at the State or local level.

Q49. Must an SEA monitor all grant and subgrant activities?

A. Yes. Under Section 201.11(b)(4), an SEA must provide assurances to ED that its subgrantees comply with all applicable statutory and regulatory requirements. In this regard, Section 80.40(a) of EDGAR requires that grantees "...monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved." This provision also requires SEA grantees to manage the day-to-day operations of subgrant activities and to monitor each program, function or activity of the grant. The SEA should monitor, for compliance with Federal statutes and regulations, any applicable State rules and policy, needs assessment findings, the approved State plan and subgrant application, and the SEA-approved operating agency agreement. To do so, SEAs are encouraged to conduct a systematic review of all MEP activities on a regular basis. Monitoring instruments should be sufficiently comprehensive to determine whether subgrantees have made progress toward meeting all approved project objectives.

Q50. How often should an SEA monitor an operating agency project on site?

A. As often as the SEA determines is needed to ensure that grant and subgrant activities comply with MEP requirements. Thus, if the SEA has reason to believe that one or more operating agencies are not adequately implementing their projects, it should monitor them more frequently. It is reasonable and appropriate for an SEA to schedule monitoring reviews prior to the award of new subgrants.

Equipment

Q51. May equipment be purchased with Chapter 1 MEP funds?

A. Yes. Under Sections 1011(a)(2) and 1202(a)(3) of the Chapter 1 statute and Section 201.48(a) of the MEP regulations, an SEA and its operating agencies are permitted to use MEP funds to acquire equipment. Before doing so, an SEA must determine that (1) the equipment is reasonable and necessary to operate its MEP effectively; (2) existing equipment it already has will not be sufficient; and (3) the costs are reasonable.

Q52. What procedures govem disposition of equipment purchased with MEP funds?

A. A State's procedures concerning disposition of equipment govern the disposition of MEP equipment, regardless of whether the State is following Part 80 of EDGAR or applying its own procedures for fiscal control and fund accountability under Section 201.2(a)(5). Section 80.32(b) of EDGAR requires that a State dispose of equipment "in accordance with State laws and procedures." The State also may adopt, as its State procedures, the disposition provisions in Section 80.32(e) of EDGAR.

Q53. When an SEA or operating agency recovers funds from the sale of equipment or real property purchased with MEP funds, may these funds be retained by that agency?

A. A State's procedures govern the disposition of MEP equipment and real property. If a State has decided to adopt the provisions in Section 80.32(e) of EDGAR as its State procedures, the SEA and its operating agencies may retain, sell, or otherwise dispose of equipment with a current per unit fair-market value of less than $5,000 with no further obligation to the Federal government. If the equipment has a per unit value of more than $5,000, Section 80.32(e)(2) requires those agencies to compensate the Federal government. Similarly, Section 80.31(c) requires the SEA or its operating agencies to compensate the Federal government if it disposes of real property purchased in whole or in part with MEP funds.

A State may also adopt other procedures for disposing of MEP equipment and property. For example, a State may establish a threshold lower than the $5,000 amount established in Section 80.32(e). In addition, instead of returning the proceeds to the Federal government under Sections 80.31(c) and 80.32(e)(2), a State may expend, or permit operating agencies to expend, those proceeds for the MEP program.

Q54. What happens to equipment purchased with MEP funds when it is no longer needed for MEP activities?

A. Because the MEP is State-operated, State procedure may provide that, when a subgrantee reports equipment as no longer needed at that project, the SEA will offer the equipment to other subgrantees to use in their MEP projects before declaring it surplus.

For equipment actually declared surplus, if a State applies Part 80 of EDGAR, Section 80.32(c)(1) provides that, when equipment is no longer needed for its original purpose, it may be used for activities currently or previously funded by other Federal programs. If there are no such current activities, the SEA should apply the State's disposition procedures.

Q55. How can an operating agency increase its flexibility to use equipment purchased with MEP funds?

A. An operating agency has several options available to increase flexibility in using MEP equipment. For example, when an operating agency is permitted by the SEA to purchase equipment with MEP funds, it may share the cost (or the SEA may require it to share the cost) with other Federal, State, or local programs that will also make use of the equipment on a proportional basis.

Likewise, an operating agency that wishes to use MEP equipment in non-MEP activities may pay a reasonable user fee to the MEP program for the portion of time the equipment is used in non-MEP activities. Further, an operating agency may use MEP equipment in non-MEP activities without paying a user fee or sharing costs in accordance with the standards described in Question 56 below. Additionally, an operating agency may take into consideration, when it decides its equipment needs under MEP, whether other equipment--e.g., LEA-funded adult education equipment used at night--would be available for MEP use during the day.

Q56. Are there circumstances under which MEP equipment may be used in non-MEP activities without paying a user fee or sharing costs?

A. Yes, subject to the standards described below. Under Sections 1011(a)(2) and 1202(a)(3) of the statute, an operating agency may use MEP funds only for programs and projects designed to meet the special educational needs of migratory children. Any equipment purchased with MEP funds must be reasonable and necessary to implement a properly designed project for migrant children. ED recognizes, however, that under some circumstances, equipment purchased as part of a properly designed MEP project may, without constituting an improper expenditure, be used on a less than full-time basis. If that equipment could be made available for other educational uses without interfering with its use in the MEP project or significantly shortening its useful life, the Department would have no objection to the non-MEP use, given the fact that it would otherwise be idle.

This guidance is consistent with Section 80.32(c) of EDGAR, which allows equipment to be made available for use on other projects or programs currently or previously supported by the Federal government, "providing such use will not interfere with the work on the projects or program for which it was originally acquired." The guidance is also consistent with parallel flexibility afforded to institutions of higher education, hospitals, and nonprofit organizations in Section 74.137, which permits shared use of equipment purchased with Federal funds in non-federally funded, as well as federally funded, projects. Because a State may adopt its own procedures for use of MEP equipment (see Sections 201.2(a)(5) of the MEP regulations and 80.32(b) of EDGAR), it could adopt the flexibility in Sections 80.32(c) or 74.137, even though those provisions do not otherwise apply to Chapter 1 programs.

The guidance set forth below assists in ensuring that limited use of MEP equipment in non-MEP activities does not interfere with the MEP and is consistent with the MEP statute and regulations.

An operating agency that decides to use MEP equipment in non-MEP activities on a part-time basis must do so in a manner that protects the integrity of the equipment as an MEP expenditure. Accordingly, the operating agency must ensure and document that:

- the MEP equipment is part of an MEP project that has been properly designed to meet the special educational needs of migrant children;
- the equipment purchased with MEP funds is reasonable and necessary to conduct the operating agency's MEP project, without regard to use in non-MEP activities;

- o the project has been designed to make maximum appropriate use of the equipment for MEP purposes; and

- o the use of the equipment in non-MEP activities does not decrease the quality or effectiveness of the MEP services provided to migrant children with the equipment, increase the cost of using the equipment for providing those services, or result in the exclusion of MEP children who otherwise would have been able to use the equipment.

The SEA and its operating agencies should be judicious in applying these standards. The Secretary will presume, without actual evidence to the contrary, that the standards have been met and that use of MEP equipment in non-MEP activities is proper if that use does not exceed 10 percent of the time the equipment is used in MEP activities. However, use above that amount in non-MEP activities is not necessarily improper if the standards are met on a case-by-case basis.

The following examples illustrate some situations in which MEP equipment may be used in non-MEP activities:

- o Computers purchased with MEP funds are used full-time during the school day but are idle during evening hours and would be beneficial to adult education classes or parent training classes that meet twice a week. The use in these classes would not be extensive and therefore would not significantly shorten the useful life of the equipment. Under these circumstances, the MEP computers may be used for the adult education or parent training classes.

- o MEP computers that are part of a properly designed MEP project are being used full-time except for one period each school day. The proper amount of computer equipment was purchased for the MEP project and the MEP project cannot be redesigned effectively to use the computers in every period. Under these circumstances, the MEP computers may be used, for example, for State or locally funded compensatory education activities during the period they are idle.

- o Ten listening centers were purchased with MEP funds and are used regularly but not continuously in the MEP project. The MEP project cannot be designed effectively to use the centers more frequently. The listening centers are used in an extracurricular foreign language program for periods of time averaging 10 percent or less of the time devoted to MEP. If the useful life of the centers is not significantly reduced, the centers may be used in this manner.

The above examples are predicated on the assumption that the equipment was a reasonable and necessary part of a properly designed Chapter 1 MEP project. An operating agency's project would be improperly designed if, for example, excess MEP equipment was purchased so that it could be available for non-MEP use, or if non-MEP use was considered in the decision to purchase MEP equipment. Essentially, purchase of MEP equipment must be made solely on the basis of the needs of the MEP program, and non-MEP use of that equipment may in no way harm the operating agency's MEP project. To ensure proper use of MEP equipment, the SEA should review, approve, and monitor operating agency use of MEP equipment in non-MEP activities.

Travel

Q57. May an SEA authorize the use of MEP funds for travel and conference costs?

A. Yes. MEP funds may be used if the travel and conferences are specifically related to the MEP projects and not to the general needs of the operating agency or LEA, and are reasonable and necessary.

Recordkeeping

Q58. What records must the SEA and its subgrantees keep under the MEP?

A. The SEA and its subgrantees must keep records that fully show:

- the amount of funds under the grant or subgrant;
- how the SEA or subgrantee uses the funds;
- the total cost of the project;
- the share of that cost provided from other sources; and
- other records to facilitate an effective audit.

In addition, the SEA and its subgrantees are required to keep records to show its compliance with program requirements. (See Sections 76.730 and 76.731 of EDGAR.)

Q59. What kinds of specific records should an SEA or its subgrantees maintain?

A. SEA or operating agency records should include, but not be limited to, the following:

- fiscal records that are up-to-date and reflect sound accounting principles, indicate disbursements of MEP funds on a separate basis from other funds, and meet the recordkeeping requirements in Section 437(a) of GEPA;
- the State's written administrative and fiscal procedures, if Part 80 of EDGAR is not adopted;
- records to show the members and activities of the State committee of practitioners;

- records to show the members and activities of the State (and local) parent advisory councils (and other parental involvement activities);

- time distribution records to support the distribution of costs for staff whose salaries come from more than one source;

- Certificates of Eligibility;

- comparability and maintenance of effort data for each operating agency and LEA, respectively, receiving an MEP subgrant;

- evaluation reports from operating agencies, which must be submitted no less than once every three years;

- the State evaluation and evidence that the SEA has made public the results of its State evaluation;

- the approved application for each operating agency that is implementing an MEP project, including approved annual updates for multi-year applications and amendments that cover changes in projects;

- information that promotes or documents compliance, such as monitoring standards, practices, procedures, activities and results; policy guidance; State regulations; standards, procedures and guidelines for approving applications; and audit reports;

- information on the numbers and types of eligible migrant children who reside in the State for a part or all of a calendar year, if this information is not fully and accurately maintained in the MSRTS, and the State and local assessments of their needs; and

- evidence of full and prompt transmittal of children's health and education records to the MSRTS.

Q60. For how long must the SEA or operating agency maintain MEP records?

A. Generally, records must be maintained for five years after the date the grantee or operating agency submits its last expenditure report for the period in question. (See Section 80.42(b)(4) and (c) of EDGAR.)

Q61. What records are necessary to support the salary costs charged to MEP funds for an employee who, under Section 201.49 of the MEP regulations, has MEP duties but also has other non-MEP responsibilities?

A. If the State applies Part 80 of EDGAR, which references the cost principles in OMB Circular A-87, the grantee must maintain appropriate time distribution records. Actual costs charged to each program must be based on the employee's time distribution records. If the State applies its own procedures rather than the procedures in Part 80, the records must demonstrate any equitable distribution of time and effort that meet the three criteria in Section 201.2(a)(5). For instructional staff, including teachers and instructional aides, class schedules that specify the time that such staff members devote to MEP activities may be used to demonstrate compliance with the requirement for time distribution records as long as there is corroborating evidence that the staff members actually carried out the schedules.

Q62. Do Federal officials have right of access to official records of a grantee or subgrantee?

A. Yes. Section 80.42(e) of EDGAR provides that, for purposes of audits, examinations, excerpts, and transcripts, ED and the General Accounting Office, or any of their authorized representatives, have the right of access to any books, documents, papers, or other records of grantees and subgrantees that are pertinent to the grant.

XI. EVALUATION

Migrant Education Program evaluation requirements address the mandate in Sections 1019 and 1202(a)(6) of Chapter 1 for program accountability. Effective evaluation provides information on program outcomes, selected characteristics of the academic achievement of migrant students, and the needs of migrant children and youth. Additionally, it assists local and State agencies to (1) determine the effectiveness of their programs; (2) improve their program planning by identifying areas in which children may need different MEP services; and (3) identify areas for program improvement.

This chapter addresses these and other aspects of evaluation under the MEP. It is designed principally to assist State and local project administrators who may need clarifications of technical information in this area.

***Statutory Requirements*:**

Sections 1019(b)(1), 1202(a)(6), and 1435 of Chapter 1 of Title I, ESEA

***Regulatory Requirements*:**

Sections 201.36(c), and 201.51 through 201.56

General

Q1. What, in general, are the MEP requirements for evaluations?

At least once every three years, each operating agency must evaluate students who participate in the instructional or support-service components of its MEP projects in terms of the desired outcomes contained in its approved application. In addition, depending on the type of project, student achievement must be measured either through the results of normed achievement tests or other objective measures of performance. For students in second grade or higher, this evaluation must conform to basic technical standards. SEAs must ensure that these evaluations are conducted properly, and that they obtain the information they need both for the State evaluation reports that must be submitted to the Secretary every two years and for their annual performance reports.

Q2. Who has responsibility for evaluating the MEP?

A. Both the SEA and its operating agencies have evaluation responsibilities. The operating agency must conduct a local project evaluation. The SEA must ensure that the operating agency conducts the local evaluation properly, and must prepare and make public a biennial evaluation of the State program that is submitted to the Secretary. The SEA also must inform its operating agencies, in advance, of the specific data that it will need for its evaluation of the Statewide program and how the data should be collected. (See Section 201.51.)

Q3. What are the principal ways in which evaluations for the migrant program differ from those for the Chapter 1 LEA program?

A. Principally, the Chapter 1 LEA program requires that the educational progress of all children, except those who participate in preschool, kindergarten, and first grade programs, be evaluated using the results of national- or State-normed tests. The MEP, on the other hand, requires the use of these tests only if possible. If it is not possible to use them, such as where projects operate only in the summer or where most students attending regular school term programs have left the school before the testing dates, any measures may be used that are objective (Section 201.52(b)(1) and (c)) and meet the technical standards contained in Section 201.53. In addition, since MEP projects, unlike Chapter 1 LEA projects, more often have support-service components, the MEP requires that they, too, be evaluated. These differences result because of the MEP's emphasis on providing educational and related support services to migrating children.

Finally, while both programs require sustained effects studies, the Chapter 1 LEA program does not require LEAs to report this information to the SEA. However, under the MEP, data on the sustained effects of formerly migratory children must be reported to both the SEA and the Secretary.

Q4. The MEP uses the terms "entered in," "enrolled," "participate," and "served" when describing aspects of a child's participation in the MEP. What do these terms mean, and which ones are used in relation to evaluation requirements and to the MEP performance report?

A. These terms are not interchangeable.

The term "entered in" refers to entry of a child, or a child's education or health records, into the Migrant Student Record Transfer System (MSRTS) where, if he or she is age 3 through 21, the child will be counted for FTE purposes.

The term "enrolled" is used generally to refer to enrollment of a child in any school program. In addition, the term is sometimes also used in connection with special summer FTE funding counts to refer to students who participate in summer MEP projects and so generate additional summer funding, for those States in which they reside, beyond the funding generated because of their residency. (See Chapter I, STATE APPLICATION AND FUNDING.)

The terms "entered in" and "enrolled" are not used in relation to evaluation requirements or the MEP performance report. The term "participate" is used in these contexts. With regard to the requirement in Section 201.51 that agencies evaluate the progress of migratory children who participate in MEP projects, "participate" refers to a migratory child who has been determined eligible for the MEP and who receives some type of assistance from the migrant program beyond being "entered in" the MSRTS. The assistance they receive, which would be delineated in the performance report, may include, but is not limited to, the following types of services: information and referral, instructional services, counseling, health services, follow-along services, school advocacy, and other types of support services.

The term "served" has been used in the past but, because of its ambiguity, should no longer be used.

Q5. Section 201.52 of the MEP regulations contains reporting requirements for the MEP. Is the information described in that section all the information that the operating agency and the SEA need to collect in order to perform an effective evaluation?

A. No. The information required by Section 201.52 is the minimum that ED requires to determine how the MEP is doing on a State-by-State and national basis. In addition to this information, SEAs and operating agencies must collect other information to meet the requirements contained in Section 201.51. In this regard, operating agencies must assess the overall progress (including the educational progress) of migratory children who participate in the program in terms of both the desired outcomes of the project and student achievement. In addition, State and local operating agencies must use their evaluations to improve services to their projects' migratory children. (See Sections 201.36(c), and 201.56.) To do this, SEAs and operating agencies may need to develop evaluation instruments and techniques in addition to those that provide the information called for in Section 201.52.

Q6. What evaluation information should operating agencies collect for regular school year MEP instructional projects?

A. Operating agencies must evaluate the overall progress of participating migratory children, including educational progress in basic and more advanced skills that all children are expected to master. To conduct these evaluations of programs for children in grades 2 through 12, operating agencies must use objective measures of the educational progress of project participants, including educational achievement in basic skills measured, if possible, over a 12-month testing interval through the use of appropriate forms and levels of national or State normed achievement tests. If this is not possible, other objective measures of the educational progress of migratory children may be used, such as criterion-referenced tests, changes in attendance patterns, dropout rates, and other objectively applied indicators. For formerly migratory children who have been served in the MEP in a full school year program for at least two years, the operating agency must use measures to determine whether improved performance has been sustained for at least one year.

Finally, the progress of the agency's preschool, kindergarten, and first grade components, like the higher grade components, must be evaluated against the desired outcomes described in the operating agency's application, and the results reported to the SEA. However, for these grades, operating agencies do not have to collect or report aggregatable achievement results. Norm-referenced achievement tests typically have low reliability for children at these ages and grade levels. (See Q8 and Q9 of this chapter, and Sections 201.51(a) and 201.52(b)(1) and (2).)

Q7. In the context of basic and more advanced skills, what are "advanced skills?"

A. The term "more advanced skills" is defined in Section 1471(13) of the Chapter 1 statute as "skills including reasoning, analysis, interpretation, problem-solving, and decision-making as they relate to the particular subjects in which instruction is provided."

Q8. Are agencies that operate MEP preschool programs subject to the MEP program evaluation requirements?

A. Yes. An operating agency must evaluate the overall progress, including the educational progress, of migratory children who participate in its preschool projects. Progress must be measured against the desired outcomes described in the operating agency's application, and the operating agency must report its evaluation results to the SEA at least once during each three-year application cycle. In addition, the SEA must evaluate, at least every two years, the State's MEP on the basis of the operating agencies' evaluations that include their preschool component. SEAs and operating agencies must ensure that the results of their evaluations are used to improve services for children in the MEP preschool projects. Preschool projects do not have to be evaluated in terms of student achievement using the national standards contained in Section 201.53, although these standards are relevant technically for the evaluation of all MEP services. (See Section 201.51.)

Q9. What are appropriate measures for evaluating early childhood (i.e., preschool, kindergarten, and first grade) programs?

A. Measures for evaluating early childhood programs might include criterion referenced tests, teacher observations, teacher rating scales, skills checklists, attendance rates, and use of library books. The instruments selected for use should measure, as validly and reliably as possible, the progress of participating children against the desired outcomes specified in the project application. No single instrument or set of instruments is appropriate for all early childhood education programs.

Q10. How can an SEA meet the requirement in Section 201.51(b) to perform a program evaluation every two years when, under Section 201.51(a)(3), the operating agencies are on a three-year evaluation schedule?

A. While operating agencies must report at least every three years, Section 201.51(b)(2) permits the SEA to require operating agencies to report more frequently in order to ensure that the statewide data are representative of the State's MEP. Alternatively, an SEA may submit, for the Secretary's approval, a sampling plan under Section 201.55 that is designed to ensure that reliable and representative data for operating agencies in the State will be provided in the statewide evaluation.

Q11. Must the operating agency evaluation include an assessment of the effectiveness of the MEP in improving children's achievement?

A. Yes.

Q12. How does the operating agency assess program effectiveness?

A. Program effectiveness is assessed by comparing program outcomes with the desired outcomes contained in the operating agency's approved application. The operating agency evaluation must include an assessment of the effectiveness of the MEP in achieving its desired outcomes, including the overall progress of migratory children who participate in the project. (See Section 1202(a)(6) of the Chapter 1 statute, Section 201.51(a)(1)(i) of the MEP regulations, and the Desired Outcomes section of this chapter.)

Q13. What resources are available to SEAs and operating agencies to assist them in implementing MEP evaluation requirements?

The Migrant Education Needs Assessment and Evaluation System (MENAES) offers a framework with which to address many of the statutory and regulatory requirements of program evaluation, and to promote the overall goal of program accountability. The Federally funded Technical Assistance Centers (TACs) and Rural Technical Assistance Centers (R-TACs) are available to assist local and State agencies in implementing evaluation requirements. A current list of TACs and R-TACs may be obtained from the Office of Migrant Education.

Q14. What are MENAES and SAPNA and how are they related?

A. MENAES is the acronym for the Migrant Education Needs Assessment and Evaluation System. MENAES was developed through the collaboration of the Office of Migrant Education, the State Directors of Migrant Education, and the Chapter 1 TACs and R-TACs in order to help State and operating agencies meet the migrant student evaluation, needs assessment, and performance report requirements. This system uses MSRTS to capture and aggregate, in a uniform manner, migrant student participation and performance data, including results of nationally normed achievement tests and other desired outcomes.

SAPNA is the acronym for the Student and Program Needs Assessment report. This report is the major product of MENAES. It includes school and student identifying data, and need indicators such as age in grade, attendance patterns, test scores, and instructional service information. The SAPNA report can also be generated with unique State options. States and operating agencies can use the SAPNA to target need areas and develop desired outcomes.

MENAES represents a systematic approach to satisfying some of the program's evaluation and reporting requirements. Its use requires relatively minor enhancements to the data that many States already enter into MSRTS. With MENAES, data can be used for multiple purposes (i.e., evaluation, needs assessment, program design, and program improvement) at multiple levels (local, State, and national).

For assistance in using MENAES to facilitate program evaluations, SEAs should contact the TAC or R-TAC in their region.

Desired Outcomes

Q15. What are desired outcomes?

A. Desired outcomes are the SEA or operating agency's goals that address the special educational needs of migrant children, including coordination among migrant programs in different States or districts. Desired outcomes must be developed for all aspects of a migrant program, including support services, early childhood, and other components that cannot be measured directly in terms of basic and advanced skills that all children are expected to master.

Q16. How are desired outcomes expressed?

A. Desired outcomes must be expressed in terms that can be measured. At a minimum they must be expressed in terms of aggregate performance, i.e., to show improvement in aggregate performance of children over the project period. Depending on the kind of MEP project to be evaluated, outcomes may be measured by norm-referenced tests or other appropriate indicators, such as criterion-referenced tests (CRTs), dropout rates, attendance rates, or retentions in grade.

Q17. Must every SEA, whether or not it directly operates a Migrant Education Program or project, address desired outcomes in its application for Federal funds?

A. Yes. Under Section 1202(a)(6) of the Chapter 1 statute, the Secretary may approve an SEA's application for MEP funding only upon a determination that MEP programs the SEA will conduct "will be evaluated in terms of their effectiveness in achieving stated goals ...." In order to obtain information needed to make this determination, ED's MEP application package requires the SEA to state each of its program objectives in measurable terms.

Q18. How does the content of the SEA's application influence the development of the operating agency's desired outcomes?

A. The SEA's approved application, and the desired outcomes contained in it, should reflect and guide the operating agency's own desired outcomes. In order to achieve a more complete picture of the success of the MEP, operating agencies are encouraged to state their desired outcomes in terms of the same indicators, such as improved student performance on norm-referenced or criterion-referenced tests (CRTs), lower dropout rates, improved attendance, or fewer retentions in grade, that are stated in the SEA's application.

Q19. Must operating agencies develop desired outcomes for all MEP components, including support services?

A. Yes. In fact, where MEP projects provide support services, early childhood education, English language instruction to LEP students, or other instruction whose results may be difficult to assess, evaluating projects against desired outcomes is necessary because performance cannot be validly and reliably assessed by other means, particularly by norm-referenced testing.

Q20. Does the SEA or operating agency develop the operating agency's desired outcomes, and are they developed annually?

A. Desired outcomes may be developed by either the SEA or the operating agency. SEA approval of the operating agency's application constitutes SEA adoption of those desired outcomes. Desired outcomes may be written for a period of one to three years depending on the term of the operating agency's approved application.

SEAs are encouraged to specify desired outcomes for all operating agencies within the State and to aggregate the results of operating agency evaluations on how well their participating students met those outcomes. (On a national level, the MSRTS data base, through MENAES, may be used similarly to aggregate some data and provide evaluation information on desired outcomes to the States.)

Q21. Can frequency counts (i.e., totals) of the number of students working at or above grade level be used as a measure of desired outcomes?

A. Yes, provided "working at or above grade level" is clearly defined as a specific expected standard of performance for students in each grade level.

Q22. What are some examples of desired outcomes?

A. Specific desired outcomes may be developed with the assistance of TACs and R-TACs. Some general examples follow.

PRESCHOOL -- In FY 1991-1992, the MEP will provide appropriate educational services to at least 75 percent of the status #1 and #2 migrant preschool age children. (Note -- The SEA may set a Statewide desired outcome of 75 percent, but the objectives for individual operating agencies may vary depending on their circumstances. For example, a new project may have an objective of 50 percent while an established project may have an objective of 90 percent.)

AGE/GRADE -- At least 5 percent more students receiving MEP instructional and support services will be able to function in a grade appropriate for their age in September 1992, than did so in September 1991. Use the following table to judge appropriate age/grade placement in September.

Age	Lowest Appropriate Grade	Age	Lowest Appropriate Grade
6	K	13	7
7	1	14	8
8	2	15	9
9	3	16	10
10	4	17	11
11	5	18	12
12	6		

BASIC AND ADVANCED SKILLS -- The operating agency specifies skills included in a State competency test as a desired outcome for Chapter 1 children. The operating agency will measure progress as follows: over the three-year period, rates for successful passage of the State minimum competency test by migratory children receiving instructional services, in grades in which the test is given, will increase from the current level of 60 percent to 70 percent. The goal for the first year will be an increase to 62 percent; for the second year an increase to 64 percent.

RETENTION IN GRADE -- Retention in grade indicates failure to attain mastery of basic and more advanced skills expected of all children. Therefore, the operating agency will measure progress as follows: over the three-year period, the percentage of children retained in grade will decrease from the current level of 15 percent to 8 percent. The goal for the first year will be a reduction to 12 percent; for the second year to a reduction to 10 percent.

DROPOUTS -- Dropout rates are indicators of students' failure to achieve in basic and more advanced skills. The operating agency will measure progress as follows: an operating agency's current dropout rate is 40 percent. It sets a desired outcome to reduce the rate to 30 percent over a three-year period. The goal will be a reduction to 37 percent at the end of the first year and 34 percent at the end of the second year.

ATTENDANCE -- The average daily attendance for the program will improve by at least 5 percent from the previous year's rate, up to 92 percent attendance for the days enrolled.

HEALTH -- 100 percent of all migratory children enrolled in school will have immunization records that meet State requirements.

CREDIT TRANSFER -- The percentage of secondary students earning full or partial credit in summer programs will be increased by 20 percent annually over the next three years. Seventy percent of all migratory students who take courses for credit and who attend at least 50 percent of the time will earn credit or partial credit in the summer term which can be transferred to their home school.

SUMMER READING -- For every week a student participates in a summer MEP project, the student will read a minimum number of pages of connected text (prose) according to grade level:

First through Third Grades -- 10 pages
Fourth through Sixth Grades -- 30 pages
Seventh and Eighth Grade -- 40 pages

Evaluation Reports

Q23. What must an operating agency include in its evaluation report to the SEA?

A. Under Section 201.51 of the program regulations, the SEA must determine the data required for its own evaluation, and notify operating agencies in advance of the data requirements and collection procedures. At a minimum, this information must include:

- aggregate achievement of students by grade (2-12) and content area (reading, mathematics, and language arts) in both basic and more advanced skills;
- information on attainment of the desired outcomes stated in the operating agency's application; and

- sustained effects information, where available, on formerly migratory children who have participated in the operating agency's full-year MEP project for at least two years. (See the Sustained Effects section of this chapter.)

For preschool, kindergarten and first grade programs, operating agencies do not have to collect or aggregate achievement data, but must report evaluation information based on other measures (i.e., desired outcomes) to the SEA.

Q24. What must the SEA include in the Performance Report it submits to ED?

A. Under Section 1019(b) of the Chapter 1 statute, the SEA submits information about the numbers and characteristics of participating children; program descriptive information; achievement data, which are broken out both by the currently and formerly migratory status of the children and by service category; and, for formerly migratory children, data on sustained effects.

Q25. Under Section 201.52 (b) and (c), agencies operating regular school year and summer school instructional programs must measure participating students' "educational achievement in basic skills." Must they also measure educational achievement in more advanced skills?

A. Sections 201.52(b) and (c) reflect the minimum evaluation requirement contained in Section 1202(a)(6) of the Chapter 1 statute, which provides only that the educational achievement of migratory students be measured in "basic skills." However, State and local operating agencies must design and evaluate their projects in terms of desired outcomes in both basic and more advanced skills. (See Sections 201.17(b)(1)(iii) and 201.51(a) of the program regulations and Section 1012(b) of the Chapter 1 statute.) Therefore, the Secretary requests information on basic and more advanced skills in the MEP performance report.

Q26. For purposes of reporting evaluation information, or completion of the performance report, how does one classify a child whose migrant status has changed during a project period?

A. If the child is a currently migratory child for any part of the project period, the child should be classified as currently migratory.

Q27. Is there a minimum amount of time that a child must be in a migrant program to be included in the annual evaluation?

A. No. All students who are entered in MSRTS and who receive instruction or supporting services should be included in appropriate parts of the evaluation, even if some of those students were absent during some of the time the project operated. For example, a student receiving only health services would be counted in terms of the demographic information required in the performance report and evaluated in terms of health-related desired outcomes but not in terms of student achievement.

Achievement Measures

Q28. What role does norm-referenced testing play in MEP evaluations?

A. Under Section 201.52 of the program regulations, norm-referenced testing must be used, if possible, to measure the educational progress of project participants. Norm-referenced test results must also be used to assess sustained gains of formerly migratory children, but should not be used to evaluate early childhood education programs. In addition to their use in evaluations, norm-referenced tests also should be used where possible for State and local needs assessments.

Results of norm-referenced testing are an integral part of MENAES. Test results available through MENAES can be used at the State and local levels to develop desired outcomes, identify areas needing program improvement, and for other purposes. Because norm-referenced test results are nationally aggregatable, they also form a critical part of the annual performance reports submitted by SEAs to the Secretary, and the biennial evaluation submitted by the Secretary to the Congress.

TACs and R-TACs can provide assistance in norm-referenced testing, and in reporting and interpreting test results.

Q29. For which participating migratory children should an operating agency administer a norm-referenced test?

A. Norm-referenced testing in a given subject area should be conducted for all those currently and formerly migratory children in grades 2 and above who: 1) are present on the operating agency's testing dates; and 2) receive MEP instructional services in that subject area at any time during the school term.

Q30. What is the common reporting scale for norm-referenced tests?

A. The common reporting scale is the normal curve equivalent (NCE), a scale that is similar to the percentile rank scale but one that permits aggregation of results. NCEs can be averaged to determine the performance of a group, while percentiles must not be averaged. The NCE scale ranges from 1 to 99; a score of 50 represents average performance nationally.

Q31. Should an annual testing cycle be used to evaluate the educational progress of both currently and formerly migratory children in regular school year instructional programs?

A. Yes. A 12-month testing cycle, i.e., spring-to-spring or fall-to-fall, should be used for all migratory children, even if doing so means that some currently migratory children are not present on the testing date. Even if high student mobility significantly reduces the number of students with matched test scores from one school year to the next, a fall-to-spring testing cycle within the same school should not be substituted. This is because testing results have little meaning unless gathered on a 12-month testing interval. A fall-to-spring testing cycle will result in exaggerated test score gains. Therefore, in order to assess validly the effect of a regular school year program, only data on an annual testing cycle should be reported.

Q32. Are there any circumstances in which test scores of children participating in MEP instructional projects should be aggregated with those of children participating in the Chapter 1 LEA programs?

A. No. Only those children who participate in the MEP project should be represented in data that is reported in MEP evaluations. However, for the educationally deprived migratory children who receive Chapter 1 LEA program services and are tested through that program, test results that are obtained under the Chapter 1 LEA program can be used for the MEP without testing the children again.

Q33. How can the appropriateness of a test be established for a given migrant population?

A. The appropriateness of any test used as part of MEP evaluations depends on whether it meets the technical standards of reliability and validity. (See Section 201.53(b).) For a test to be considered reliable and valid, it must take into account such factors as the age, grade, mobility, language, degree of language fluency, background of the children who participate in the project and the match between the test items and the project curriculum.

Q34. If regular school term or summer term instructional projects serve large numbers of currently migratory children who typically are not enrolled in school on the testing dates, operating agencies may obtain little data on the educational progress of participating children. Under these circumstances, what types of objective measures besides norm-referenced testing may be used to assess the effectiveness of these projects?

If norm-referenced testing is not possible, the SEA or operating agency may use other acceptable measures of educational progress of migratory children such as changes in (1) attendance patterns; (2) course dropout and school dropout rates; (3) use of library books and resource materials; and (4) other appropriate measures that take into consideration factors such as the age, grade, mobility, language, degree of language fluency, and background of the persons served by the project.

These other measures may include objective measures of the child's classroom performance (e.g., basal reading level, retention in grade), teacher rating scales, and other objective measures used by teachers, provided they meet the technical standards for validity and reliability contained in Section 201.53 of the regulations.

Q35. Does the requirement in Section 201.52 that the project's evaluation design include "objective measures of educational progress" apply to measures other than standardized achievement tests?

A. Yes. All measures of educational progress must be objective and meet the technical standards in Section 201.53.

Q36. Can student progress on skills checklists or similar instruments be a satisfactory objective measure of basic skills achievement where testing cannot be used?

A. Yes, provided that the checklist and the way it is used meet the technical standards for validity and reliability contained in Section 201.53 of the regulations. The Chapter 1 TACs and R-TACs can assist SEAs and operating agencies in developing and validating appropriate measures for basic skills achievement.

Technical Standards

Q37. What are the "technical standards"?

A. Under Section 201.51 of the MEP regulations, evaluations of student achievement in all programs, except those for preschool, kindergarten, and first grade, must conform to four technical standards. Under these the standards, which are further described in Section 201.53 of the MEP regulations:

- evaluation findings must be representative of all students served;
- evaluation instruments and procedures must be reliable and valid;
- evaluation procedures must contain quality control mechanisms that minimize errors; and
- student progress in meeting project objects must be assessed accurately and objectively.

Assistance in applying the technical standards may be obtained from the TACs and R-TACs.

Q38. To what aspects of evaluation do the technical standards in Section 201.53 apply?

A. The standards apply to all aspects of evaluation -- measuring the attainment of desired outcomes for both instructional and support services, assessing educational progress through achievement testing, and studying the sustained effects of the program for formerly migratory students. Taken together, the standards ensure that MEP evaluations will be of high technical quality.

Q39. Does the requirement that the results of testing be reliable and valid (see Q33 and Q35 of this chapter) also apply to the use of other objective measures of educational progress?

A. Yes. All measurements should meet the reliability and validity standard. Objective measures such as student attendance or numbers of books checked out of the library generally are more reliable than subjective measures such as an observation instrument. However, for some assessments of children's behavior, a child observation instrument used in such a way as to minimize observer error can provide relatively valid and reliable information.

Q40. How can a locally made skills checklist be documented as reliable and valid?

A. Documenting that a skills checklist is reliable and valid requires (1) a comparison of the instrument to other assessments that measure the same thing; (2) statistical testing on repeated uses of the instrument to determine the consistency of its findings, and; (3) comparisons of measurement procedures and results obtained from those who administer the checklist to determine consistency of scoring, i.e., "inter-rater reliability." Assistance in documenting a checklist can be provided by the TACs and R-TACs.

Q41. When do the SEA's evaluation findings meet the representativeness standard (Section 201.53(a))?

A. Evaluation findings meet the representativeness standard when they accurately reflect the characteristics or achievement of all program participants. This may be accomplished either by including all participants in the evaluation, or by ensuring that evaluation results are gathered according to a sampling plan approved by ED under Section 201.55.

Evaluations results are not representative when information is missing systematically for some group of program participants. For example, if a reading achievement test were administered only to a limited number of program participants who speak English fluently, the data would not be representative of all program participants.

For many desired outcomes, such as for parental involvement, health, or grade-promotion, representativeness of data should not pose problems. This is because data reasonably can be reported on all participants, regardless of their length of participation in the project. In other cases, while it may not be possible to have completely representative data on all desired outcomes, especially those measured by tests, every effort should be made to make the evaluation findings representative. Representativeness of data can be improved through make-up testing and other follow-up procedures.

Q42. Who must use the technical standards?

A. Both the operating agencies and the SEAs must use the technical standards to ensure that the data collection instruments and procedures to be used will appropriately measure the overall progress of project participants.

Q43. What are some examples of procedures to minimize error?

A. At the operating agency level, data collectors should be carefully trained in test administration and scoring, and the recording and aggregation of scores should be double-checked for accuracy. At the SEA level, at a minimum, results from one year should be compared to those of the preceding year to identify any unusually discrepant results (outliers).

Sustained Effects

Q44. Under Sections 201.51(a)(2)(i) and 201.52(b)(2) of the MEP regulations, operating agencies must determine whether the improved performance of formerly migratory children has been sustained over a two year period. Should currently migratory children be excluded from these sustained effects reports?

A. Yes.

Q45. How can one measure improved performance over a two-year period?

A. Three measures are taken. A baseline measure is taken the first year and then two other measures are taken in the two succeeding years, all at approximately twelve-month intervals. For example, a test measure could be obtained for a student in the fall of 1991, again in the fall of 1992, and a third time in the fall of 1993. Formerly migratory children have sustained improved performance over a two-year period if the aggregate level of performance that was attained at the time of the first post-test is greater than it was at the time of the pre-test, and has not declined when measured at the third data point.

Q46. Does the requirement to report on sustained effects apply to all projects serving formerly migratory children, regardless of the duration or type of services in which the children participated (e.g., dental checkups, health services, or counseling)?

A. The requirement to measure sustained effects applies to all programs with formerly migratory children who have participated in a regular school year instructional program offered by the same operating agency for at least two consecutive years, and who received MEP instructional services during those years. Test data on these formerly migratory children should correlate with the type of MEP-sponsored instructional service in which the child participated. For example, math scores should be reported only for those students who participated in MEP-sponsored math instructional services.

Q47. Must sustained effects data be reported to the SEA?

A. Yes. Under Section 201.51(a)(3), the operating agency must report its evaluation results to the SEA. These results include sustained gains information.

Q48. Must sustained effects data be reported by the SEA to ED?

A. Yes. Data on sustained effects must be reported, by grade and subject area, in the State's annual performance report. These data must be aggregated across the State's operating agencies.

Q49. If an operating agency's MEP fails to show a gain in a particular grade and subject area as a result of its program evaluation, must it still report to the State on sustained effects in that grade and subject area?

A. Yes. In order for the State to report to ED on a statewide basis whether improved performance has been sustained over time, an operating agency should report, for a given grade and subject area, aggregated test scores at three data points for all those formerly migratory children who have participated in the operating agency's MEP instructional program for at least two years. At the same time, if an operating agency's MEP program fails to show a gain from pre-test to post-test in a particular grade and subject area, both the State and operating agency should use these evaluation results, as required by Sections 201.56 and 201.36(c), to modify the program, as necessary.

Q50. What strategies have been identified that best promote sustained gains in migrant education?

A. Successful strategies are outlined in Effective Schools Research and the Effective Compensatory Education Sourcebooks, which have been distributed to the SEAs by ED through the TACs and R-TACs. There are numerous other publications and materials available commercially and through universities and colleges. LEAs and SEAs may also have developed resources for assisting operating agencies in the design and improvement of effective strategies.

Program Improvement

Q51. Do the Chapter 1 LEA program improvement requirements apply to the MEP?

A. No. The program improvement requirements in Sections 200.37 and 200.38 of the Chapter 1 LEA Program regulations ***DO NOT*** apply to MEP projects.

Q52. What, if any, program improvement requirements do apply to the MEP?

A. Under Sections 201.56 and 201.36(c) of the MEP regulations, (1) evaluation results for all projects and project components (including those for summer projects and support services) must be used to improve services provided to participating migratory children; and (2) the SEA may not approve an operating agency application if the evaluation results demonstrate that its MEP project is not making substantial progress toward meeting its educational goals. If the evaluation results indicate that an operating agency's project is ineffective or needs to be improved, the SEA must require appropriate changes in the project or disapprove the application.

Program improvement may be advanced by prompt and careful study of evaluation, needs assessment, and other types of data, such as data that might be available in summary form from MSRTS through MENAES. At any point in the year, this data may suggest a need to "fine-tune" the current program or justify a modification in program services.

Q53. What documentation should the SEA and its operating agencies retain to demonstrate that they have used the results of the operating agencies' evaluations to improve their MEP projects?

A. The SEA and its operating agencies should retain any information that documents how programs have changed in response to evaluation findings. Such information might include: (1) the evaluation procedures and results; (2) the previous and current applications; (3) other descriptions of program design that can identify changes made in it;

(4) summaries of programmatic changes that were made on the basis of evaluation results; and (5) any other evidence of SEA and operating agency program improvement.

Q54. How can evaluation data be used for program improvement in the MEP?

A. Some examples of the use of evaluation data for program improvement are as follows:

- In reviewing achievement test data for migratory students enrolled during the regular school year, an agency finds that performance in mathematics decreased sharply at fifth grade, and continued afterwards at a lower achievement level. The operating agency therefore decides to provide more MEP instructional support in mathematics at the intermediate grades.

- An operating agency receives summaries of evaluation data (through a MENAES report) on one of its desired outcomes -- increased promotion rates for its migratory students. Comparing these data with statewide promotion rates for migratory children, as well as State and local promotions rates for all children, the operating agency finds that the promotion rates of the kindergarten and first grade migratory children it serves are considerably lower than those of the district, State or State MEP overall. The agency also finds that no improvement has occurred in the promotion rates for its migratory children in those grades for two years. The operating agency therefore decides to increase services to students at these levels and to provide outreach and awareness activities through the regular district staff to correct this problem.

Sampling Plans

Q55. When may sampling be appropriate?

A. Typically, sampling may be appropriate for very large programs where evaluating the achievement of the entire population served is not feasible or would be extremely costly. ED has issued Guidance For Developing A Plan To Sample Local Chapter 1 Programs For State Chapter 1 Evaluations. This guidance is available from the Office of Migrant Education upon request. Agencies that wish to use sampling should be sure to consider carefully the time and resources that proper sampling requires.

Q56. What conditions do the MEP requirements impose on an SEA's use of sampling?

A. If an SEA wishes to use sampling in its evaluation of the State's MEP, the SEA must submit, for prior approval by the Secretary, a proposed sampling plan designed to ensure that evaluations will be based on a representative sample of its operating agencies, or of students within its operating agencies, in any school year. If the Secretary approves the sampling plan, the SEA must review it at least once every three years, and request that the Secretary approve a revised plan, if necessary. (See Section 201.55.)

The sample should represent all of the students served by the State's MEP in terms of grade levels, types of schools, instructional services received, support services received, and any other known characteristic that might influence the impact of the MEP on the students' achievement of basic and more advanced skills. The sample must be drawn randomly so that every student has a known, non-zero chance of being included, and it must be large enough to guarantee that results will be representative of the entire population.

Q57. What sampling methods are appropriate to ensure the representativeness of an operating agency's evaluation findings?

A. Any sampling method that ensures that the data will represent all children served by the State's MEP may be used with the Secretary's approval. TACs and R-TACs are available to assist SEAs with the development of sampling plans. (For a discussion of the representativeness standard, see the Technical Standards section of this chapter.)

Q58. To what extent can a sample be "representative" of students in situations in which many migratory students either leave before, or arrive after, the operating agency's testing date(s)?

A. The larger the proportion of migratory student participants who are represented in performance measures, the greater the likelihood that findings will reflect all students served by the project. If an operating agency experiences extensive attrition when comparing the number of migratory students served with the number for whom performance measures were actually obtained, evaluation results may not reflect the overall progress made by the project participants.

Evaluation of Summer Programs

Q59. What are the minimum requirements for evaluations of MEP summer programs and projects?

A. The evaluation design for summer school instructional projects must be based on desired outcomes using objective measures of the educational progress of project participants (including educational achievement in basic and more advanced skills) over the project performance period. (See Sections 201.52(c) and (d).) The evaluation design for summer school support service components must include measures of their effects on participants that are consistent with the defined support service objectives.

Q60. For evaluating summer school instructional projects, what kinds of "objective measures of educational progress" may be used?

A. These include such measures as criterion-referenced tests, attendance patterns, dropout rates, and other objectively applied indicators of student achievement. It is possible that these measures will be the same as the "educationally related objective criteria" that are used in conducting the annual needs assessment. (See Section 201.32(c).)

Q61. If objective measures of the educational progress of project children are difficult to identify, may summer school projects use other measures?

A. No. Only objective measures of the educational progress of project participants over the performance period may be used by any MEP project.

Q62. Must summer migrant programs use normed achievement tests as the objective measure of educational progress in basic or more advanced skills?

A. No. ED recognizes the difficulty of finding normed achievement tests that can accurately measure short-term changes in achievement. However, a criterion referenced test is one example of a test that might serve as an appropriate measure of student progress under these circumstances.

Q63. What are other objective measures that agencies operating summer projects can use to evaluate participating students' achievement in basic or more advanced skills?

A. Examples of other objective measures could include measures of classroom performance as evidenced by the child (e.g., basal reading level, attendance, retention in grade), teacher rating scales, dropout rates, attendance patterns, usage of library books and resource materials, and other objective measures used by teachers. However, to be objective, the measures used must meet the technical standards specified in Section 201.53 of the regulations.

Q64. Is the pre-test/post-test evaluation model appropriate for use by summer projects even if the test used is not norm-referenced?

A. Yes. Under Section 201.52(c)(1) of the program regulations, the summer school instructional project must include objective measures over the project performance period. This does not preclude pre- and post-testing if such testing is objective and meets the technical standards. Pre- and post-testing on a criterion-referenced test, for example, would be appropriate if it is used to determine whether the child has made substantial progress in achieving the project goals.

Q65. Must data from summer migrant education programs be summarized at the State levels?

A. Yes. Under Section 1019(b) of the statute and Section 201.51(b)(2) of the MEP regulations, States must report evaluation data on all MEP projects. These include summer school projects.

Evaluation of Support Services

Q66. How does an SEA or operating agency evaluate the success of MEP support-service components?

A. The SEA or operating agency must measure the effects of support services against the desired outcomes for support services stated in their applications. For example, changes in student attendance rates may be an appropriate measure of the effect of guidance and counseling services.

Other possible measures of the effects of support services in terms of desired outcomes include:

- determinations of the number or percentage of project students seeking and receiving guidance/counseling services;
- measurements of the percentage of project students meeting defined health standards; or
- evaluations of the change in the rate of parental involvement in various activities for project students.

XII. GEPA AND EDGAR

Preceding chapters largely address programmatic issues that are specific to Federal, State or local administration of the Chapter 1 MEP. However, the MEP is also governed by general administrative requirements contained in the General Education Provisions Act (GEPA), a Federal statute containing laws applicable to most ED programs, and the Education Department's General Administrative Regulations (EDGAR), which contain specific administrative and fiscal requirements that govern the award, administration, and enforcement of grants under programs ED administers.

This chapter summarizes the provisions of GEPA and EDGAR that apply to the MEP. It also discusses audits, the process that GEPA has established for ED's recovery of MEP funds that an SEA or operating agency misspends, and ways in which SEAs may receive a grantback of a portion of the funds ED recovers.

Statutory Requirements:

Section 1438 of Chapter 1 of Title I, ESEA and all sections of GEPA except Sections 408(a)(1), 426(a), 427, 430, 434 (other than 434(a)(2) which applies), 435 (other than 435(b)(2) and (5) which apply), 436 (other than 436(b)(2) and (3) which apply), 455 and 458

Regulatory Requirements:

Section 201.2 and Parts 76, 77, 80, 81, 82, 85 and 86 of EDGAR

Applicable Provisions

Q1. What provisions of GEPA apply to the MEP?

A. Section 1438 of Chapter 1 makes the provisions of GEPA apply to Chapter 1 except for the following sections that are superseded by specific sections of Chapter 1:

- Section 408(a)(1) of GEPA - superseded by Section 1431 (Federal Regulations);
- Section 426(a) of GEPA - superseded by Section 1437 (Appropriations for Evaluation and Technical Assistance);
- Section 427 of GEPA - superseded by Section 1016 (Parental Involvement);
- Section 430 of GEPA - superseded by Section 1012 (Basic Programs--Assurances and Applications);
- Section 455 of GEPA - superseded by Section 1433 (Withholding of Payment); and
- Section 458 of GEPA - superseded by Section 1434 (Judicial Review) with respect to judicial review of withholding of payments.

Only the following subsections relating to fiscal control and fund accounting procedures of Sections 434, 435, and 436 of GEPA apply to the MEP:

- Section 434(a)(2);
- Section 435(b)(2) and (5); and
- Section 436(b)(2) and (3).

GEPA has been included in this manual as Appendix B.

Q2. What provisions of EDGAR apply to the MEP?

A. Under Section 201.2 of the MEP regulations, the following portions of EDGAR apply:

- a limited number of provisions in Part 76 (State Administered Programs);
- Part 77 (Definitions);
- Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless the State chooses to use its own written fiscal and administrative requirements;
- Part 81 (GEPA -- Enforcement); and
- Part 85 (Government-wide Debarment and Suspension (Non-Procurement) and Government-wide Requirements for Drug-Free Workplace (Grants)).

In addition, Part 82 of EDGAR (New Restrictions on Lobbying), and Part 86 (Drug-Free Schools and Campuses) also apply to the MEP.

While mentioned in Section 201.2, Part 78 (Education Appeal Board) and Part 79 (Intergovernmental Review of Department of Education Programs and Activities) are no longer applicable.

Relevant sections of EDGAR have been included in this manual as Appendix C.

Q3. What provisions in Part 76 apply to the MEP?

A. The following provisions in Part 76 apply to the Chapter 1 MEP:

- 76.1 - Programs to which Part 76 applies;
- 76.2 - Exceptions in program regulations to Part 76;
- 76.50 - Statutes determining eligibility and whether subgrants are made;

- 76.51 - A State distributes funds by formula or competition;
- 76.125-76.137 - Consolidated Grant Applications for Insular Area;
- 76.401 - Disapproval of an application--opportunity for a hearing;
- 76.500 - Federal statutes and regulations on nondiscrimination;
- 76.530 - General cost principles;
- 76.532 - Use of funds for religion prohibited;
- 76.533 - Acquisition of real property; construction;
- 76.534 - Use of tuition and fees restricted;
- 76.560 - General indirect cost rates; exceptions;
- 76.561 - Approval of indirect cost rates;
- 76.563 - Restricted indirect cost rate--programs covered;
- 76.591 - Federal evaluation--cooperation by a grantee;
- 76.592 - Federal evaluation - satisfying requirement for State or subgrantee evaluation;
- 76.600 - Where to find construction regulations;
- 76.670-76.677 - Procedures for bypass;
- 76.681 - Protection of human research subjects;
- 76.682 - Treatment of animals;
- 76.683 - Health or safety standards for facilities;
- 76.700 - Compliance with statutes, regulations, State plan, and applications;
- 76.701 - The State or subgrantee administers or supervises each project;
- 76.702 - Fiscal control and fund accounting procedures;
- 76.703 - When a State may begin to obligate funds;
- 76.704 - When certain subgrantees may begin to obligate funds;
- 76.705 - Funds may be obligated during a "carryover period;"

- 76.706 - Obligations made during a carryover period are subject to current statutes, regulations, and applications;
- 76.707 - When obligations are made;
- 76.720 - Financial and performance reports by a State;
- 76.722 - A subgrantee makes reports required by the State;
- 76.730 - Records related to grant funds;
- 76.731 - Records related to compliance;
- 76.734 - Record retention period;
- 76.740 - Protection of and accessibility to student records; and
- 76.760 - More than one program may assist a single activity.

Q4. May a State apply its own written fiscal and administrative procedures rather than Part 80, which implements OMB Circulars A-102 and A-87?

A. Yes. If a State wishes to apply its own written fiscal and administrative requirements rather than Part 80 of EDGAR, those requirements must:

- provide guidance that is sufficiently specific to ensure compliance with all applicable statutory and regulatory requirements;
- ensure that funds are spent for reasonable and necessary costs of operating Chapter 1 MEP programs; and
- ensure that funds are not used for general expenses required to carry out other responsibilities of State and local governments.

Q5. If a State decides to adopt its own fiscal and administrative requirements rather than Part 80 of EDGAR, must the committee of practitioners review the decision?

A. Yes. Under Section 1451 of Chapter 1 and Section 201.46(e), the committee of practitioners must be convened to review any major proposal or final rule or regulation before publication.

Q6. May an SEA apply portions of Part 80 and also use its own written procedures for other items covered by Part 80?

A. Yes.

Q7. How long must SEAs and LEAs retain fiscal and compliance records?

A. Under Section 437(a) of GEPA and Sections 76.734 and 80.42(b) and (c) of EDGAR, SEAs and LEAs must retain records for five years after completion of a grant activity.

Q8. Do governmentwide debarment and suspension (nonprocurement) requirements and governmentwide requirements for a drug-free workplace apply to the MEP?

A. Yes. Part 85 of EDGAR, which implements Executive Order 12549 in Subparts A-E and the Drug-free Workplace Act of 1988 in Subpart F, applies to MEP projects.

The regular debarment and suspension regulations provide that statutory entitlements and mandatory awards (but not lower-tier awards thereunder which are not themselves mandatory) are not covered by the debarment and suspension regulations (Section 85.110(a)(2)(i) of EDGAR). The Secretary has concluded that this exception from coverage precludes the Secretary from denying funding under the MEP or any other State-administered program based on a regular debarment or suspension. The exception also would prevent ED from denying assistance to a subgrantee under any program in which subgrantees are entitled to funds if they meet certain requirements.

While ED could not cut off funds to the SEA, the Secretary has determined that all lower-tier covered transactions, such as the employment of an administrator (a covered transaction under Section 85.110(a)(1)(ii)(A)), would be subject to the debarment and suspension regulations. Such a debarment would not prohibit the receipt of funds by the State or mandatory subgrantee. However, the debarment would prohibit the subject individual from acting as a principal (i.e., from exercising primary, supervisory or administrative responsibility) for the State or subgrantee or from participating in any other covered transaction under nonprocurement programs of the Federal Government.

As a result, if ED discovered any activity by an administrator of the MEP that would constitute grounds for debarment, the debarring official for ED would take action to debar the individual. Further, if a State continued to do business with the individual and paid for the individual's services with MEP funds, ED would consider issuing a program determination letter to the State to recover the MEP funds. Accordingly, each State must submit to ED a primary-tier certification that its principals have not been debarred or suspended.

Under the drug-free workplace requirements in Subpart F, all grantees receiving a grant from any Federal agency must certify that they will maintain a drug-free workplace. The regulations do not apply to subgrantees. The Department has authority to deny funds under entitlement programs such as the MEP to grantees that fail to meet the drug-free workplace requirements. Because the regulations do not apply to subgrantees, there is no need for States to take any other action to fully implement the requirements.

Audits

Q9. What does the Single Audit Act of 1984 require?

A. The Single Audit Act of 1984 (whose provisions are implemented through the Appendix to Part 80 of EDGAR) requires that an independent auditor annually audit SEAs or LEAs receiving $100,000 or more a year in Federal assistance for internal control and compliance. Those receiving between $25,000 and $100,000 a year have the option of participating in the single audit or an audit made in accordance with the requirements of the programs in which they participate. State and local governments receiving less than $25,000 a year are governed by audit requirements prescribed by State or local law or regulation.

Under a single audit, each major Federal assistance program is tested for representative charges based on the auditor's judgment.

Q10. Can MEP funds pay for the cost, or a portion of the cost, of a Single Audit?

A. MEP funds can pay a prorated share of the cost of the audit according to the percentage it contributes toward the total amount of Federal assistance received by the SEA or LEA. The percentage may be exceeded in cases where appropriate documentation shows higher actual costs were incurred to audit the MEP program.

Q11. Who receives single audit reports?

A. Auditors submit a copy of the audit reports to the organization audited. When an LEA or operating agency is audited, a copy of the report goes to the SEA. The SEA submits copies of the report to each Federal agency providing program funds. Recipients of more than $100,000 in Federal funds must submit a copy to the following clearinghouse designated by OMB: Data Preparation Division, U.S. Bureau of the Census, 1202 East 10th Street, Jeffersonville, Indiana 47132.

Q12. What other statutory and regulatory provisions govern audits?

A. Sections 451-454, 456-457 and 459-60 of GEPA describe ED's procedures on audits, including provisions for the grantees right of appeal of an audit finding. An applicant for Federal funds accepts and affirms the right of the General Accounting Office (GAO) and any authorized representative of the sponsoring agency, to access and examine all records, books, papers, or documents related to the grant. GAO is the investigative arm of Congress and conducts program audits at the request of Congress.

Q13. Who has the authority to conduct audits of the use of MEP funds?

A. At the Federal level, both ED's Office of the Inspector General (OIG) and the GAO are empowered to conduct audits of the use of program funds. The OIG conducts three types of audits: 1) external audits of grantee or contractor operations; 2) internal audits of ED administration and management; and 3) national audits of issues or problem areas having national significance and requiring corrective action at the Federal level.

At the State level, audits are conducted annually by independent auditors, as required by the Single Audit Act. States implement this provision through use of a State auditor or hiring of independent auditing firms.

Q14. Is ED's Office of Migrant Education (OME) authorized to conduct audits?

A. No. However, if OME believes, based on a program review, that an audit would be appropriate, it may request that one be conducted. (See Section 452(a)(2) of GEPA.)

Q15. Is ED's Office of the Inspector General similar to other ED offices?

A. No. The Office of the Inspector General (OIG) of the Department of Education was created by Congress in the Inspector General Act of 1978. While it reports to the Secretary, it is separate and distinct from the program office units in the Department. The authorizing statute establishes OIG as an independent and objective unit which, in general terms:

- conducts and supervises audits and investigations relating to the programs and operations of the Department;
- provides leadership, coordination, and recommendations on activities that (1) promote economy, efficiency, and effectiveness; and (2) reduce or detect fraud and abuse in the administration of programs; and
- provides a means of keeping the Secretary and Congress informed about problems and deficiencies relating to the administration of the Department's programs and the necessity for corrective action.

Q16. How can recipients of ED funds prepare for an audit?

A. Ongoing activities that develop audit readiness include:

- establishing internal controls;
- complying with Federal requirements;
- establishing and maintaining proper recordkeeping and record retention systems; and
- Requesting internal audits.

In addition, internal controls should be examined by asking questions such as the following:

- Do payroll records support charges to Federal funds?
- Are procedures in place to verify that charges are allowable under the grant or contract provisions?

- Are procedures adequate to verify that program participants are eligible?

- Do corrective actions result from monitoring reviews?

Q17. What are some characteristics of a good internal control system?

A. Internal controls should include these components:

- a plan of organization that segregates duties as appropriate in order to safeguard resources;

- a system of authorization and recording procedures adequate to provide effective accounting control over assets, liabilities, revenues, and expenses;

- established practices that are followed by each organizational component in performing its duties and functions;

- qualified personnel trained to perform their responsibilities; and

- effective systems of internal review.

Q18. What kinds of activities might be the subject of an audit?

A. An audit might review compliance requirements such as the following, which are applicable to ED programs:

- charges for direct labor to Federal grants;

- treatment of grant-related income;

- reporting of financial status;

- eligibility of participants;

- monitoring of activities; and

- allowability of services.

Q19. For how long must records of Federally funded activities be retained for possible audit?

A. Records relating to Federally funded activities involving any portion of an audit process initiated prior to the end of the record retention period must be retained until the audit, audit resolution, or audit appeal has been completed. Recordkeeping should establish an audit trail beginning with the preparation of the application, and should include records to support the application. (See Chapter X - STATE ADMINISTRATION for general recordkeeping requirements.)

Q20. What are the rights of a grantee in audit proceedings?

A. Grantees have a right to comment on the draft and final audit reports. They have a right to appeal a program determination letter (PDL) that could involve reimbursements to the Federal government, or other penalties, as well as corrective action that must be taken. They also have a right to appeal to ED's Office of Administrative Law Judges (OALJ).

Grantbacks

Q21. What is a grantback?

A. In cases where ED has recovered funds from an SEA or operating agency that misspent MEP funds or failed to account properly for them, the SEA may request a "grantback" of the recovered funds. A grantback is the award that ED may make to an SEA or LEA out of the recovered funds; it may not exceed 75 percent of the funds that ED recovers.

Q22. What requirements must be met for the Secretary to award a grantback to an SEA?

A. If an SEA wishes to request a grantback of Chapter 1 MEP funds, the Chief State School Officer should submit the following to the Assistant Secretary for Elementary and Secondary Education:

- a letter that--
  - a. requests the repayment of funds; and
  - b. provides assurances that--
  - (1) the practices in the SEA or LEA that resulted in the violation of law have been corrected; and
  - (2) the MEP in the SEA or LEA has been reviewed during the current school year, and the SEA has determined that it is in compliance with all applicable MEP requirements.
- a detailed explanation, including documentation if available, of actions taken to correct the specific violations.
- a plan for the use of grantback funds that--
  - a. meets the requirements of the MEP;
  - b. to the extent possible, benefits the migratory children who were affected by the failure to comply or the misuse of funds that resulted in the recovery. (If a time lapse makes it impossible to serve the same children, the plan must justify use of funds for the benefit of current participating migratory children);

c. shows that the use of the funds would achieve the purposes of the MEP; and

d. includes the following:

(1) an identification of the recipient(s) of the grantback funds;

(2) a brief description of the current MEP;

(3) a detailed description of the activities to be provided with grantback funds and how these activities would supplement the regular program;

(4) an itemized budget that shows how the recipient(s) would spend the funds on the proposed activities;

(5) the beginning and ending dates of the project period;

(6) evidence that parents or representatives of the children who would benefit from the grantback funds were consulted in planning the program; and

(7) a description of how equitable services would be provided to eligible private school children.

- evidence that the SEA has fully satisfied its financial liability or has entered into a repayment agreement with ED. It is important for the SEA to address any other outstanding debts with ED by making payment or by entering into a repayment agreement with ED before requesting a grantback of MEP funds.
- if funds were repaid to ED as the result of LEA audit findings under the Single Audit Act, audit materials that provide the basis for a step-by-step description of how the audit determinations were resolved by the SEA.

Q23. How long does it take to get a grantback?

A. From the time ED receives an approvable plan (one that includes the above requirements), it usually takes three to four months to complete the process.

Q24. What is the period of availability for the use of grantback funds?

A. The period of availability is based on the Federal fiscal year, which ends on September 30. Grantback funds may remain available for expenditure for no more than three fiscal years following the fiscal year in which final agency action occurs. For example, if a final action occurred on November 25, 1989 (FY 1990), the period of availability would last until September 30, 1993.

Q25. What constitutes "final agency action" in determining the period of availability?

A. Final agency action for a program determination received by a State on or after October 25, 1988 is the last applicable event of the following:

- o the issuance of written notice of a disallowable decision issued by an authorized ED official; or, if no disallowance decision was issued, the date that repayment was made;
- o a decision by ED's Office of Administrative Law Judges (OALJ) upholding the disallowance decision;
- o sixty days after receipt of the OALJ's decision; or the Secretary's decision modifying or setting aside the OALJ's decision; or
- o a negotiated settlement and/or repayment agreement between ED and the SEA while a case is under administrative review.

NOTE: For program determinations received by a State on or after October 25, 1988, which are appealed to court, "final agency action" is the last applicable administrative action listed above, not any subsequent court decision or other action taken during judicial review.

Q26. What are the terms and conditions to which a grantback payment is subject during and after the project period?

A. Section 459(b) of GEPA provides that any payments made under a grantback arrangement shall be subject to the terms and conditions that ED deems necessary to accomplish the purposes of the program. These include, but are not limited to, the following:

- o the funds awarded under the grantback must be spent in accordance with:
  - a. all applicable statutory and regulatory requirements;
  - b. the plan submitted by the SEA or LEA for the use of the funds and any amendments to that plan that are approved by ED; and
  - c. the budget included in the plan and any amendments to the budget approved by ED.
- o all the funds awarded under the grantback must be obligated within the project period included in the plan.
- o separate accounting records must be maintained documenting the expenditure of the repaid funds.

- a report must be submitted to ED no later than 90 days after the completion of the project that indicates that the funds were spent in accordance with the plan and the budget included in the plan.

Q27. Must ED notify the public of the intent to award a grantback?

A. Yes. ED must publish a notice in the Federal Register 30 days prior to making a grantback payment. The notice explains the terms and conditions under which payment will be made and describes the plan for the use of funds. During the 30-day period, interested persons may submit comments regarding the proposed arrangement.

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[1] This table of contents is not part of the Elementary and Secondary Education Act. It is included for the convenience of the user.

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TITLE I—BASIC PROGRAMS

CHAPTER 1—FINANCIAL ASSISTANCE TO MEET SPECIAL EDUCATIONAL NEEDS OF CHILDREN

SEC. 1001. DECLARATION OF POLICY AND STATEMENT OF PURPOSE.

(a) DECLARATION OF POLICY.—In recognition of—

(1) the special educational needs of children of low-income families and the impact of concentrations of low-income families on the ability of local educational agencies to provide educational programs which meet such needs, and

(2) the special educational needs of children of migrant parents, of Indian children, and of handicapped, neglected, and delinquent children,

the Congress declares it to be the policy of the United States to—

(A) provide financial assistance to State and local educational agencies to meet the special needs of such educationally deprived children at the preschool, elementary, and secondary levels;

(B) expand the program authorized by this chapter over the next 5 years by increasing funding for this chapter by at least $500,000,000 over baseline each fiscal year and thereby increasing the percentage of eligible children served in each fiscal year with the intent of serving all eligible children by fiscal year 1993; and

(C) provide such assistance in a way which eliminates unnecessary administrative burden and paperwork and

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[1] So in law. Probably should be title VIII.

overly prescriptive regulations and provides flexibility to State and local educational agencies in making educational decisions.

(b) Statement of Purpose.—The purpose of assistance under this chapter is to improve the educational opportunities of educationally deprived children by helping such children succeed in the regular program of the local educational agency, attain grade-level proficiency, and improve achievement in basic and more advanced skills. These purposes shall be accomplished through such means as supplemental education programs, schoolwide programs, and the increased involvement of parents in their children's education.

(20 U.S.C. 2701)

PART A—BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

Subpart 1—Allocations

SEC. 1005. BASIC GRANTS.

(a) Amount of Grants.—

(1) Grants for territories.—There is authorized to be appropriated for each fiscal year for the purpose of this paragraph 1 percent of the amount appropriated for such year for payments to States under this section. The amount appropriated pursuant to this paragraph shall be allotted by the Secretary (A) among Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands according to their respective need for grants under this part, and (B) to the Secretary of the Interior in the amount necessary (i) to make payments pursuant to paragraph (1) of subsection (d), and (ii) to make payments pursuant to paragraph (2) of subsection (d). The grant which a local educational agency in Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands is eligible to receive shall be determined pursuant to such criteria as the Secretary determines will best carry out the purposes of this chapter.

(2) Grants for local educational agencies and Puerto Rico.—

(A) In any case in which the Secretary determines that satisfactory data for that purpose are available, the grant which a local educational agency in a State is eligible to receive under this subpart for a fiscal year shall (except as provided in paragraph (3)), be determined by multiplying the number of children counted under subsection (c) by 40 percent of the amount determined under the next sentence. The amount determined under this sentence shall be the average per pupil expenditure in the State except that (i) if the average per pupil expenditure in the State is less than 80 percent of the average per pupil expenditure in the United States, such amount shall be 80 percent of the average per pupil expenditure in the United States, or (ii) if the average per pupil expenditure in the State is more than 120 percent of the average per pupil expenditure in the United States, such amount shall be 120 percent of the average per pupil expenditure in the United States.

(B) In any case in which such data are not available, subject to paragraph (3), the grant for any local educational agency in a State shall be determined on the basis of the aggregate amount of such grants for all such agencies in the county or counties in which the school district of the particular agency is located, which aggregate amount shall be equal to the aggregate amount determined under subparagraph (A) for such county or counties, and shall be allocated among those agencies upon such equitable basis as may be determined by the State educational agency in accordance with the basic criteria prescribed by the Secretary.

(C) For each fiscal year, the Secretary shall determine the percentage which the average per pupil expenditure in the Commonwealth of Puerto Rico is of the lowest average per pupil expenditure of any of the 50 States. The grant which the Commonwealth of Puerto Rico shall be eligible to receive under this subpart for a fiscal year shall be the amount arrived at by multiplying the number of children counted under subsection (c) for the Commonwealth of Puerto Rico by the product of—

(i) the percentage determined under the preceding sentence; and

(ii) 32 percent of the average per pupil expenditure in the United States.

(3) SPECIAL ALLOCATION PROCEDURES.—

(A) Upon determination by the State educational agency that a local educational agency in the State is unable or unwilling to provide for the special educational needs of children described in clause (C) of paragraph (1) of subsection (c), who are living in institutions for neglected or delinquent children, the State educational agency shall, if it assumes responsibility for the special educational needs of such children, be eligible to receive the portion of the allocation to such local educational agency which is attributable to such neglected or delinquent children, but if the State educational agency does not assume such responsibility, any other State or local public agency, as determined by regulations established by the Secretary, which does assume such responsibility, shall be eligible to receive such portion of the allocation.

(B) In the case of local educational agencies which serve in whole or in part the same geographical area, and in the case of a local educational agency which provides free public education for a substantial number of children who reside in the school district of another local educational agency, the State educational agency may allocate the amount of the grants for those agencies among them in such manner as it determines will best carry out the purposes of this chapter.

(C) In any State in which a large number of local educational agencies overlap county boundaries, the State educational agency may apply to the Secretary for authority during any particular fiscal year to make the allocations under this part (other than section 1006) directly to local educational agencies without regard to the counties or may continue to make such allocations if the agency had the authority to do so under chapter 1 of the Education Consolidation and Improvement Act of 1981. If the Secretary approves an application of a State educational agency for a particular year under this subparagraph, the State educational agency shall provide assurances that such allocations will be made using precisely the same factors for determining a grant as are used under this part and that a procedure will be established through which local educational agencies dissatisfied with the determinations made by the State educational agency may appeal directly to the Secretary for a final determination.

(4) DEFINITION.—For purposes of this subsection, the term "State" does not include Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(b) MINIMUM NUMBER OF CHILDREN TO QUALIFY.—A local educational agency shall be eligible for a basic grant for a fiscal year under this subpart only if it meets the following requirements with respect to the number of children counted under subsection (c):

(1) In any case (except as provided in paragraph (3)) in which the Secretary determines that satisfactory data for the purpose of this subsection as to the number of such children are available on a school district basis, the number of such children in the school district of such local educational agency shall be at least 10.

(2) In any other case, except as provided in paragraph (3), the number of such children in the county which includes such local educational agency's school district shall be at least 10.

(3) In any case in which a county includes a part of the school district of the local educational agency concerned and the Secretary has not determined that satisfactory data for the purpose of this subsection are available on a school district basis for all the local educational agencies or all the counties into which the school district of the local educational agency concerned extends, the eligibility requirement with respect to the number of such children for such local educational agency shall be determined in accordance with regulations prescribed by the Secretary for the purposes of this subsection.

(c) CHILDREN TO BE COUNTED.—

(1) CATEGORIES OF CHILDREN.—The number of children to be counted for purposes of this section is the aggregate of—

(A) the number of children aged 5 to 17, inclusive, in the school district of the local educational agency from families below the poverty level as determined under paragraph (2)(A),

(B) the number of children aged 5 to 17, inclusive, in the school district of such agency from families above the poverty level as determined under paragraph (2)(B), and

(C) the number of children aged 5 to 17, inclusive, in the school district of such agency living in institutions for neglected or delinquent children (other than such institutions operated by the United States) but not counted pursuant to subpart 3 of part D for the purposes of a grant to a State agency, or being supported in foster homes with public funds.

(2) Determination of number of children.—

(A) For the purposes of this section, the Secretary shall determine the number of children aged 5 to 17, inclusive, from families below the poverty level on the basis of the most recent satisfactory data available from the Department of Commerce for local educational agencies (or, if such data are not available for such agencies, for counties); and in determining the families which are below the poverty level, the Secretary shall utilize the criteria of poverty used by the Bureau of the Census in compiling the most recent decennial census.

(B) For purposes of this section, the Secretary shall determine the number of children aged 5 to 17, inclusive, from families above the poverty level on the basis of the number of such children from families receiving an annual income, in excess of the current criteria of poverty, from payments under the program of aid to families with dependent children under a State plan approved under title IV of the Social Security Act; and in making such determinations the Secretary shall utilize the criteria of poverty used by the Bureau of the Census in compiling the most recent decennial census for a family of 4 in such form as those criteria have been updated by increases in the Consumer Price Index. The Secretary shall determine the number of such children and the number of children of such ages living in institutions for neglected or delinquent children, or being supported in foster homes with public funds, on the basis of the caseload data for the month of October of the preceding fiscal year (using, in the case of children described in the preceding sentence, the criteria of poverty and the form of such criteria required by such sentence which were determined for the calendar year preceding such month of October) or, to the extent that such data are not available to the Secretary before January of the calendar year in which the Secretary's determination is made, then on the basis of the most recent reliable data available to the Secretary at the time of such determination. The Secretary of Health and Human Services shall collect and transmit the information required by this subparagraph to the Secretary not later than January 1 of each year.

(C) When requested by the Secretary, the Secretary of Commerce shall make a special estimate of the number of children of such ages who are from families below the poverty level (as determined under subparagraph (A) of this paragraph) in each county or school district, and the Secretary is authorized to pay (either in advance or by way of reimbursement) the Secretary of Commerce the cost of making this special estimate. The Secretary of Commerce shall give consideration to any request of the chief executive of a State for the collection of additional census information. For purposes of this section, the Secretary shall consider all children who are in correctional institutions to be living in institutions for delinquent children.

(d) PROGRAM FOR INDIAN CHILDREN.—

(1) From the amount allotted for payments to the Secretary of the Interior under the second sentence of subsection (a)(1), the Secretary of the Interior shall make payments to local educational agencies, upon such terms as the Secretary determines will best carry out the purposes of this chapter with respect to out-of-State Indian children in the elementary and secondary schools of such agencies under special contracts with the Department of the Interior. The amount of such payment may not exceed, for each such child, 40 percent of (A) the average per pupil expenditure in the State in which the agency is located, or (B) 120 percent of such expenditure in the United States, whichever is the greater.

(2) The amount allotted for payments to the Secretary of the Interior under the second sentence of subsection (a)(1) for any fiscal year shall be, as determined pursuant to criteria established by the Secretary, the amount necessary to meet the special educational needs of educationally deprived Indian children on reservations serviced by elementary and secondary schools for Indian children operated with Federal assistance or operated by the Department of the Interior. Such payment shall be made pursuant to an agreement between the Secretary and the Secretary of the Interior containing such assurances and terms as the Secretary determines will best achieve the purposes of this chapter. Such agreement shall contain (A) an assurance that payments made pursuant to this subparagraph will be used solely for programs and projects approved by the Secretary of the Interior which meet the applicable requirements of subpart 2 of this part and that the Department of the Interior will comply in all other respects with the requirements of this chapter, and (B) provision for carrying out the applicable provisions of subpart 2 of this part and part F. Such agreement shall consider a tribal organization operating a school under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) or the Tribally Controlled Schools Act of 1987 as a local educational agency, and shall consider the Secretary of the Interior as a State or State educational agency for all purposes defining the authority of States or State educational agencies relative to local educational agencies. If, in the capacity as a State educational agency, the Secretary of the Interior promulgates regulations applicable to such tribal organizations, the Secretary shall comply

with section 1451 of this Act and with section 553 of title 5 of the United States Code, relating to administrative procedure, and such regulations must be consistent with subsections (d) and (e) of section 1121, section 1130, and section 1133 of the Education Amendments of 1978.

(e) STATE MINIMUM.—(1) For any fiscal year for which—

(A) sums available for the purposes of this section exceed sums available under chapter 1 of the Education Consolidation and Improvement Act of 1981 for fiscal year 1988; and

(B)(i) sums available for the purpose of section 1006 equal or exceed $400,000,000, or

(ii) sums available for the purpose of section 1005 equal or exceed amounts appropriated for such purpose in fiscal year 1988 by $700,000,000,

the aggregate amount allotted for all local educational agencies within a State may not be less than one-quarter of 1 percent of the total amount available for such fiscal year under this section.

(2) The provisions of paragraph (1) shall apply only if each State is allotted an amount which is not less than the payment made to each State under chapter 1 of the Education Consolidation and Improvement Act of 1981 for fiscal year 1988.

(3)(A) No State shall, by reason of the application of the provisions of paragraph (1) of this subsection, be allotted more than—

(i) 150 percent of the amount that the State received in the fiscal year preceding the fiscal year for which the determination is made, or

(ii) the amount calculated under subparagraph (B),

whichever is less.

(B) For the purpose of subparagraph (A)(ii), the amount for each State equals—

(i) the number of children in such State counted under subsection (c) in the fiscal year specified in subparagraph (A),

multiplied by

(ii) 150 percent of the national average per pupil payment made with funds available under this section for that year.

(g) [1] DURATION OF ASSISTANCE.—During the period beginning October 1, 1988, and ending September 30, 1993, the Secretary shall, in accordance with the provisions of this part, make payments to State educational agencies for grants made on the basis of entitlements created under this section.

(20 U.S.C. 2711)

SEC. 1006. GRANTS FOR LOCAL EDUCATIONAL AGENCIES IN COUNTIES WITH ESPECIALLY HIGH CONCENTRATIONS OF CHILDREN FROM LOW-INCOME FAMILIES.

(a) ELIGIBILITY FOR AND AMOUNT OF SPECIAL GRANTS.—

(1)(A) Except as otherwise provided in this paragraph, each county, in a State other than Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, which is eligible for a grant under this chapter for any fiscal year shall be entitled to an additional grant under this section for that fiscal year if—

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[1] So in original. Probably should be redesignated as "(f)".

(i) the number of children counted under section 1005(c) of this chapter in the school district of local educational agencies in such county for the preceding fiscal year exceeds 6,500, or

(ii) the number of children counted under section 1005(c) exceeds 15 percent of the total number of children aged five to seventeen, inclusive, in the school districts of local educational agencies in such county in that fiscal year.

(B) Except as provided in subparagraph (C), no State described in subparagraph (A) shall receive less than—

(i) one-quarter of 1 percent of the sums appropriated under subsection (c) of this section for such fiscal year; or

(ii) $250,000,

whichever is higher.

(C) No State shall, by reason of the application of the provisions of subparagraph (B)(i) of this paragraph, be allotted more than—

(i) 150 percent of the amount that the State received in the fiscal year preceding the fiscal year for which the determination is made, or

(ii) the amount calculated under subparagraph (B),

whichever is less.

(D) For the purpose of subparagraph (C), the amount for each State equals—

(i) the number of children in such State counted for purposes of this section in the fiscal year specified in subparagraph (B),

multiplied by

(ii) 150 percent of the national average per pupil payment made with funds available under this section for that year.

(2) For each county in which there are local educational agencies eligible to receive an additional grant under this section for any fiscal year the Secretary shall determine the product of—

(A) the greater of—

(i) the number of children in excess of 6,500 counted under section 1005(c) for the preceding fiscal year, in the school districts of local educational agencies of a county which qualifies on the basis of subparagraph (A) of paragraph (1); or

(ii) the number of children counted under section 1005(c) for the preceding fiscal year in the school districts of local educational agencies in a county which qualifies on the basis of subparagraph (B) of paragraph (1); and

(B) the quotient resulting from the division of the amount determined for those agencies under section 1005(a)(2) of this chapter for the fiscal year for which the determination is being made divided by the total number of children counted under section 1005(c) for that agency for the preceding fiscal year.

(3) The amount of the additional grant to which an eligible county is entitled under this section for any fiscal year shall be an amount which bears the same ratio to the amount reserved under subsection (c) for that fiscal year as the product determined under paragraph (2) for such county for that fiscal year bears to the sum of such products for all counties in the United States for that fiscal year.

(4) For the purposes of this section, the Secretary shall determine the number of children counted under section 1005(c) for any county, and the total number of children aged five to seventeen, inclusive, in school districts of local educational agencies in such county, on the basis of the most recent satisfactory data available at the time the payment for such county is determined under section 1005.

(5)(A) Pursuant to regulations established by the Secretary and except as provided in subparagraphs (B) and (C) and paragraph (6), funds allocated to counties under this part shall be allocated by the State educational agency only to those local educational agencies whose school districts lie (in whole or in part) within the county and which are determined by the State educational agency to meet the eligibility criteria of clauses (i) and (ii) of paragraph (1)(A). Such determination shall be made on the basis of the available poverty data which such State educational agency determines best reflect the current distribution in the local educational agency of low-income families consistent with the purposes of this chapter. The amount of funds under this part that each qualifying local educational agency receives shall be proportionate to the number or percentage of children from low-income families in the school districts of the local educational agency.

(B) In counties where no local educational agency meets the criteria of clause (i) or (ii) of paragraph (1)(A), the State educational agency shall allocate such funds among the local educational agencies within such counties (in whole or in part) in rank order of their respective concentration and numbers of children from low-income families and in amounts which are consistent with the degree of concentration of poverty. Only local educational agencies with concentrations of poverty that exceed the county wide average of poverty shall receive any funds pursuant to the provisions of this subparagraph.

(C) In States which receive the minimum grant amount under paragraph (1), the State educational agency shall allocate such funds among the local educational agencies in such State by either of the following methods:

(i) in accordance with the provisions of subparagraphs (A) and (B) of this paragraph; or

(ii) without regard to the counties in which such local educational agencies are located, in rank order of their respective concentration and numbers of children from low-income families and in amounts which are consistent with the degree of concentration of poverty, except that only those local educational agencies with concentrations of poverty that exceed the Statewide average of poverty shall receive any funds pursuant to the provisions of this clause.

(6) A State may reserve not more than 2 percent of its allocation under this section for the purpose of making direct payments to local educational agencies that meet the criteria of clauses (i) and (ii) of paragraph (1)(A), but are otherwise ineligible.

(b) Payments; Use of Funds.—

(1) The total amount which counties in a State are entitled to under this section for any fiscal year shall be added to the amount paid to that State under section 1401 for such year. From the amount paid to it under this section, the State shall distribute to local educational agencies in each county of the State the amount (if any) to which it is entitled under this section.

(2) The amount paid to a local educational agency under this section shall be used by that agency for activities undertaken pursuant to its application submitted under section 1012 and shall be subject to the other requirements in subpart 2 of this part.

(c) Reservation of Funds.—

(1) For any fiscal year for which amounts appropriated for part A of this chapter exceed $3,900,000,000, the amounts specified in paragraph (2) of this subsection shall be available to carry out this section.

(2)(A) The first $400,000,000 in excess of $3,900,000,000 appropriated for part A of this chapter in any fiscal year shall be available to carry out this section.

(B) Whenever the amounts appropriated for part A exceed $4,300,000,000 in any fiscal year, 10 percent of the amount appropriated for that fiscal year shall be available to carry out this section, except that no State shall, as a result of implementation of paragraph (2) of this subsection, receive less under section 1005 than it received for the previous fiscal year under such section or under section 554(a)(1)(A) of the Education Consolidation and Improvement Act of 1981.

(d) Ratable Reduction Rule.—If the sums available under subsection (c) for any fiscal year for making payments under this section are not sufficient to pay in full the total amounts which all States are entitled to receive under subsection (a) for such fiscal year, the maximum amounts which all States are entitled to receive under subsection (a) for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

(20 U.S.C. 2712)

Subpart 2—Basic Program Requirements

SEC. 1011. USES OF FUNDS.

(a) Program Description.—

(1) A local educational agency may use funds received under this part only for programs and projects which are designed to

meet the special educational needs of educationally deprived children identified in accordance with section 1014 and which are included in an application for assistance approved by the State educational agency.

(2) Such programs and projects under paragraph (1) may include preschool through secondary programs; the acquisition of equipment and instructional materials; books and school library resources; employment of special instructional personnel, school counselors, and other pupil services personnel; employment and training of education aides; payments to teachers of amounts in excess of regular salary schedules as a bonus for service in schools serving project areas; the training of teachers, librarians, other instructional and pupil services personnel, and, as appropriate, early childhood education professionals (including training in preparation for the implementation of programs and projects in a subsequent school year); the construction, where necessary, of school facilities; parental involvement activities under section 1016; planning for and evaluation of such programs and projects assisted under this chapter; and other expenditures authorized under this chapter.

(3) State and local educational agencies are encouraged to develop programs to assist eligible children to improve their achievement in basic skills and more advanced skills and to consider year-round services and activities, including intensive summer school programs.

(b) INNOVATION PROJECTS.—Subject to the approval of the State educational agency, a local educational agency may use not more than 5 percent of payments under this part for the costs of conducting innovative projects developed by the local educational agency that include only—

(1) the continuation of services to children eligible for services in any preceding year for a period sufficient to maintain progress made during their eligibility;

(2) the provision of continued services to eligible children transferred to ineligible areas or schools as part of a desegregation plan for a period not to exceed 2 years;

(3) incentive payments to schools that have demonstrated significant progress and success in attaining the goals of this chapter;

(4) training of chapter 1 and nonchapter 1 paid teachers and librarians with respect to the special educational needs of eligible children and integration of activities under this part into regular classroom programs;

(5) programs to encourage innovative approaches to parental involvement or rewards to or expansion of exemplary parental involvement programs;

(6) encouraging the involvement of community and private sector resources (including fiscal resources) in meeting the needs of eligible children; and

(7) assistance by local educational agencies of schools identified under section 1021(b).

(20 U.S.C. 2721)

SEC. 1012. ASSURANCES AND APPLICATIONS.

(a) STATE EDUCATIONAL AGENCY ASSURANCES.—Any State desiring to participate under this chapter shall submit to the Secretary, through its State educational agency, assurances that the State educational agency—

(1) will meet the requirements in section 435(b)(2) and (b)(5) of the General Education Provisions Act relating to fiscal control and fund accounting procedures;

(2) will carry out the activities required under this chapter with regard to evaluation and school program improvement;

(3) has on file a program improvement plan that meets the requirements of section 1020; and

(4) will ensure that its local educational agencies and State agencies receiving funds under this chapter comply with all applicable statutory and regulatory provisions pertaining to this chapter.

Such assurances shall remain in effect for the duration of participation under this chapter.

(b) LOCAL APPLICATIONS.—A local educational agency may receive a grant under this chapter for any fiscal year if it has on file with the State educational agency an application which describes the procedure to be used under section 1014(b) to assess students' needs and establish program goals, describes the programs and projects to be conducted with such assistance for a period of not more than 3 years, and describes the desired outcomes for eligible children, in terms of basic and more advanced skills that all children are expected to master, which will be used as the basis for evaluating the program or project as required by section 1019, and such application has been approved by the State educational agency and developed in consultation with teachers and parents.

(c) LOCAL ASSURANCES.—Such application shall provide assurance that the programs and projects described—

(1) are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting the special educational needs of the children being served, are designed and implemented in consultation with teachers (including early childhood education professionals and librarians when appropriate), and provide for parental involvement in accordance with section 1016;

(2) make provision for services to educationally deprived children attending private elementary and secondary schools in accordance with section 1017;

(3) allocate time and resources for frequent and regular coordination of the curriculum under this chapter with the regular instructional program; and

(4) in the case of participating students who are also limited English proficient or are handicapped, provide maximum coordination between services provided under this chapter and services provided to address children's handicapping conditions or limited English proficiency, in order to increase program effectiveness, eliminate duplication, and reduce fragmentation of the students' programs.

(20 U.S.C. 2722)

SEC. 1013. ELIGIBLE SCHOOLS.

(a) GENERAL PROVISIONS.—

(1) Subject to subsection (b), a local educational agency shall use funds received under this chapter in school attendance areas having high concentrations of children from low-income families (hereinafter referred to as "eligible school attendance areas"), and where funds under this chapter are insufficient to provide programs and projects for all educationally deprived children in eligible school attendance areas, a local educational agency shall annually rank its eligible school attendance areas from highest to lowest within each grade span grouping or for the entire local educational agency, according to relative degree of concentration of children from low-income families. A local educational agency may carry out a program or project assisted under this chapter in an eligible school attendance area only if it also carries out such program or project in all other eligible school attendance areas which are ranked higher under the first sentence of this paragraph.

(2) The same measure of low income, which shall be chosen by the local educational agency on the basis of the best available data and which may be a composite of several indicators, shall be used with respect to all school attendance areas within a grade span grouping or for the entire local educational agency, both to identify the areas having high concentrations of children from low-income families and to determine the ranking of each area.

(3) The requirements of this subsection shall not apply in the case of a local educational agency with a total enrollment of less than 1,000 children, but this paragraph does not relieve such an agency from the responsibility to serve eligible children according to the provisions of section 1014.

(b) LOCAL EDUCATIONAL AGENCY DISCRETION.—Notwithstanding subsection (a)(1) of this section, a local educational agency shall have discretion to identify and rank eligible attendance areas as follows:

(1) A local educational agency may designate as eligible and serve all of its attendance areas within a grade span grouping or in the entire local educational agency if the percentage of children from low-income families in each attendance area of the agency is within 5 percentage points of the average percentage of such children within a grade span grouping or for the entire local educational agency.

(2) A local educational agency may designate any school attendance area in which at least 25 percent of the children are from low-income families as an eligible school attendance area if the aggregate amount expended under this chapter and under a State program meeting the requirements of section 1018(d)(1)(B) in that fiscal year in each school attendance area of that agency eligible under subsection (a) in which projects assisted under this chapter were carried out in the preceding fiscal year equals or exceeds the amount expended from those sources in that area in such preceding fiscal year if such at-

tendance areas qualify for such amounts under subsection (c)(1).

(3) A local educational agency may, with the approval of the State educational agency, designate as eligible and serve school attendance areas with substantially higher numbers or percentages of educationally deprived children before school attendance areas with higher concentrations of children from low-income families, but this paragraph shall not permit the provision of services to more school attendance areas than could otherwise be served. A State educational agency shall approve such a proposal only if the State educational agency finds that the proposal will not substantially impair the delivery of deprived children from low-income families in project areas served by the local educational agency.

(4) Funds received under this part may be used for educationally deprived children who are in a school which is not located in an eligible school attendance area when the proportion of children from low-income families in average daily attendance in such school is substantially equal to the proportion of such children in an eligible school attendance area of such agency.

(5) If an eligible school attendance area or eligible school was so designated and served in accordance with subsection (a) in the immediately preceding fiscal year, it may continue to be so designated for the subsequent fiscal year even though it does not qualify as eligible under such subsection in such additional year.

(6) With the approval of the State educational agency, eligible school attendance areas or eligible schools which have higher proportions or numbers of children from low-income families may be skipped if they are receiving, from non-Federal funds, services of the same nature and scope as would otherwise be provided under this part, except that (A) the number of children attending private elementary and secondary schools who receive services under this part shall be determined without regard to non-Federal compensatory education funds which serve eligible children in public elementary and secondary schools, and (B) children attending private elementary and secondary schools who receive assistance under this part shall be identified in accordance with this section and without regard to skipping public school attendance areas or schools under this paragraph.

(c) ALLOCATIONS.—

(1) Except as provided in paragraph (2), a local educational agency shall allocate funds under this part among project areas or schools on the basis of the number and needs of children to be served as determined in accordance with section 1014.

(2) Children in eligible schools, who receive services under this part and subsequently become ineligible due to improved academic achievement attributable to such services, may continue to be considered eligible for 2 additional years only for the purpose of determining the allocation of funds among eligi-

ble schools under paragraph (1). Any funds so allocated shall be used to provide services to any children determined to be eligible under section 1014.

(20 U.S.C. 2723)

SEC. 1014. ELIGIBLE CHILDREN.

(a) GENERAL PROVISIONS.—

(1) Except as provided in subsections (c) and (d) of this section and section 1015, a local educational agency shall use funds received under this part for educationally deprived children, identified in accordance with subsection (b) as having the greatest need for special assistance, in school attendance areas or schools satisfying the requirements of section 1013.

(2) The eligible population for services under this part are—

(A) those children up to age 21 who are entitled to a free public education through grade 12, and

(B) those children who are not yet at a grade level where the local educational agency provides a free public education, yet are of an age at which they can benefit from an organized instructional program provided in a school or other educational setting.

(b) ASSESSMENT OF EDUCATIONAL NEED.—A local educational agency may receive funds under this part only if it makes an assessment of educational needs each year to (1) identify educationally deprived children in all eligible attendance areas; (2) identify the general instructional areas on which the program will focus; (3) select those educationally deprived children who have the greatest need for special assistance, as identified on the basis of educationally related objective criteria established by the local educational agency, which include written or oral testing instruments, that are uniformly applied to particular grade levels throughout the local educational agency; and (4) determine the special educational needs (and library resource needs) of participating children with specificity sufficient to ensure concentration on such needs.

(c) LOCAL EDUCATIONAL AGENCY DISCRETION.—(1) Educationally deprived children who begin participation in a program or project assisted under this part, in accordance with subsections (a) and (b) but who, in the same school year, are transferred to a school attendance area or school not receiving funds under this part, may, if the local agency so determines, continue to participate in a program or project funded under this part for the duration of that same school year.

(2) In providing services under this part a local educational agency may skip educationally deprived children in greatest need of assistance who are receiving, from non-Federal sources, services of the same nature and scope as would otherwise be provided under this part.

(3) A child who, in the previous year, was identified as being in greatest need of assistance, and who continues to be educationally deprived, but who is no longer identified as being in greatest need of assistance, may participate in a program or project assisted under this part while continuing to be educationally deprived for a maximum of 2 additional years.

(d) SPECIAL RULES.—(1) Children receiving services to overcome a handicapping condition or limited English proficiency shall also be eligible to receive services under this part, if they have needs stemming from educational deprivation and not related solely to the handicapping condition or limited English proficiency. Such children shall be selected on the same basis as other children identified as eligible for and selected to receive services under this part. Funds under this part may not be used to provide services that are otherwise required by law to be made available to such children.

(2) A student who at any time in the previous 2 years was receiving services under subpart 3 of part D of this chapter or under subpart 3 of part B of title I of the Elementary and Secondary Education Act (as amended by chapter 1 of the Education Consolidation and Improvement Act of 1981) shall be considered eligible for services under this part, and may be served subject to the provisions of subsections (a) and (b).

(20 U.S.C. 2724)

SEC. 1015. SCHOOLWIDE PROJECTS.

(a) USE OF FUNDS FOR SCHOOLWIDE PROJECTS.—In the case of any school serving an attendance area that is eligible to receive services under this part and in which, for the first year of the 3-year period of projects assisted under this section, not less than 75 percent of the children are from low-income families or any eligible school in which not less than 75 percent of the children enrolled in the school are from low-income families, the local educational agency may carry out a project under this part to upgrade the entire educational program in that school if the requirements of subsections (b), (c), (d), and (e) are met.

(b) DESIGNATION OF SCHOOLS.—A school may be designated for a schoolwide project under subsection (a) if—

(1) a plan has been developed for that school by the local educational agency and has been approved by the State educational agency which—

(A) provides for a comprehensive assessment of educational needs of all students in the school, in particular the special needs of educationally deprived children;

(B) establishes goals to meet the special needs of all students and to ensure that educationally deprived children are served effectively and demonstrate performance gains comparable to other students;

(C) describes the instructional program, pupil services, and procedures to be used to implement those goals;

(D) describes the specific uses of funds under this part as part of that program; and

(E) describes how the school will move to implement an effective schools program as defined in section 1471, if appropriate;

(2) the plan has been developed with the involvement of those individuals who will be engaged in carrying out the plan, including parents, teachers, librarians, education aides, pupil services personnel, and administrators (and secondary students if the plan relates to a secondary school);

(3) the plan provides for consultation among individuals described in paragraph (2) as to the educational progress of all students and the participation of such individuals in the development and implementation of the accountability measures required by subsection (e);

(4) appropriate training is provided to parents of children to be served, teachers, librarians, and other instructional, administrative, and pupil services personnel to enable them effectively to carry out the plan;

(5) the plan includes procedures for measuring progress, as required by subsection (e), and describes the particular measures to be used; and

(6)(A) in the case of a school district in which there are one or more schools described in subsection (a) and there are also one or more other schools serving project areas, the local educational agency makes the Federal funds provided under this part available for children in such schools described in subsection (a) in amounts which, per educationally deprived child served, equal or exceed the amount of such funds made available per educationally deprived child served in such other schools; and

(B) the average per pupil expenditure in schools described in subsection (a) (excluding amounts expended under a State compensatory education program) for the fiscal year in which the plan is to be carried out will not be less than such expenditure in such schools in the previous fiscal year, except that the cost of services for programs described in section 1018(d)(2)(A) shall be included for each fiscal year as appropriate only in proportion to the number of children in the building served in such programs in the year for which this determination is made.

(c) Approval of Plan; Operation of Project.—

(1) The State educational agency shall approve the plan of any local educational agency for a schoolwide project if that plan meets the requirements of subsection (b).

(2) For any school which has such a plan approved, the local educational agency—

(A) shall, in order to carry out the plan, be relieved of any requirements under this part with respect to the commingling of funds provided under this chapter with funds available for regular programs;

(B) shall use funds received under this part only to supplement, and to the extent practicable, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the school approved for a schoolwide project under paragraph (1);

(C) shall comply with the provisions of section 1018(c); and

(D) may not be required to identify particular children as being eligible to participate in projects assisted under this part but shall identify educationally deprived children for purposes of subsections (b) and (e) of this section.

(d) Use of Funds.—In addition to uses under section 1011, funds may be used in schoolwide projects for—

(1) planning and implementing effective schools programs, and

(2) other activities to improve the instructional program and pupil services in the school, such as reducing class size, training staff and parents of children to be served, and implementing extended schoolday programs.

(e) ACCOUNTABILITY.—

(1) The State educational agency may grant authority for a local educational agency to operate a schoolwide project for a period of 3 years. If a school meets the accountability requirements in paragraphs (2) and (3) at the end of such period, as determined by the State educational agency, that school will be allowed to continue the schoolwide project for an additional 3-year period.

(2)(A) Except as provided in subparagraph (B), after 3 years, a school must be able to demonstrate (i) that the achievement level of educationally deprived children as measured according to the means specified in the plan required by subsection (b) exceeds the average achievement of participating children districtwide, or (ii) that the achievement of educationally deprived children in that school exceeds the average achievement of such children in that school in the 3 fiscal years prior to initiation of the schoolwide project.

(B) For a secondary school, demonstration of lower dropout rates, increased retention rates, or increased graduation rates is acceptable in lieu of increased achievement, if achievement levels over the 3-year schoolwide project period, compared with the 3-year period immediately preceding the schoolwide project, do not decline.

(3) Schools shall annually collect achievement and other assessment data for the purposes of paragraph (2). The results of achievement and other assessments shall be made available annually to parents, the public, and the State educational agency.

(20 U.S.C. 2725)

SEC. 1016. PARENTAL INVOLVEMENT.

(a) FINDINGS; GENERAL REQUIREMENT.—

(1) Congress finds that activities by schools to increase parental involvement are a vital part of programs under this chapter.

(2) Toward that end, a local educational agency may receive funds under this chapter only if it implements programs, activities, and procedures for the involvement of parents in programs assisted under this chapter. Such activities and procedures shall be planned and implemented with meaningful consultation with parents of participating children and must be of sufficient size, scope, and quality to give reasonable promise of substantial progress toward achieving the goals under subsection (b).

(3) For purposes of this section, parental involvement includes, but is not limited to, parent input into the design and implementation of programs under this chapter, volunteer or

paid participation by parents in school activities, and programs, training, and materials which build parents' capacity to improve their children's learning in the home and in school.

(b) GOALS OF PARENTAL INVOLVEMENT.—In carrying out the requirements of subsection (a), a local educational agency shall, in coordination with parents of participating children, develop programs, activities, and procedures which have the following goals—

(1) to inform parents of participating children of the program under this chapter, the reasons for their children's participation in such programs, and the specific instructional objectives and methods of the program;

(2) to support the efforts of parents, including training parents, to the maximum extent practicable, to work with their children in the home to attain the instructional objectives of programs under this chapter and to understand the program requirements of this chapter and to train parents and teachers to build a partnership between home and school;

(3) to train teachers and other staff involved in programs under this chapter to work effectively with the parents of participating students;

(4) to consult with parents, on an ongoing basis, concerning the manner in which the school and parents can better work together to achieve the program's objectives and to give parents a feeling of partnership in the education of their children;

(5) to provide a comprehensive range of opportunities for parents to become informed, in a timely way, about how the program will be designed, operated, and evaluated, allowing opportunities for parental participation, so that parents and educators can work together to achieve the program's objectives; and

(6) to ensure opportunities, to the extent practicable, for the full participation of parents who lack literacy skills or whose native language is not English.

(c) MECHANISMS FOR PARENTAL INVOLVEMENT.—

(1) Each local educational agency, after consultation with and review by parents, shall develop written policies to ensure that parents are involved in the planning, design, and implementation of programs and shall provide such reasonable support for parental involvement activities as parents may request. Such policies shall be made available to parents of participating children.

(2) Each local educational agency shall convene an annual meeting to which all parents of participating children shall be invited, to explain to parents the programs and activities provided with funds under this chapter. Such meetings may be districtwide or at the building level, as long as all such parents are given an opportunity to participate.

(3) Each local educational agency shall provide parents of participating children with reports on the children's progress, and, to the extent practical, hold a parent-teacher conference with the parents of each child served in the program, to discuss that child's progress, placement, and methods by which parents can complement the child's instruction. Educational

personnel under this chapter shall be readily accessible to parents and shall permit parents to observe activities under this chapter.

(4) Each local educational agency shall (A) provide opportunities for regular meetings of parents to formulate parental input into the program, if parents of participating children so desire; (B) provide parents of participating children with timely information about the program; and (C) make parents aware of parental involvement requirements and other relevant provisions of programs under this chapter.

(5) Parent programs, activities, and procedures may include regular parent conferences; parent resource centers; parent training programs and reasonable and necessary expenditures associated with the attendance of parents at training sessions; hiring, training, and utilization of parental involvement liaison workers; reporting to parents on the children's progress; training and support of personnel to work with parents, to coordinate parent activities, and to make contact in the home; use of parents as classroom volunteers, tutors, and aides; provision of school-to-home complementary curriculum and materials and assistance in implementing home-based education activities that reinforce classroom instruction and student motivation; provision of timely information on programs under this chapter (such as program plans and evaluations); soliciting parents' suggestions in the planning, development, and operation of the program; providing timely responses to parent recommendations; parent advisory councils; and other activities designed to enlist the support and participation of parents to aid in the instruction of their children.

(6) Parents of participating children are expected to cooperate with the local educational agency by becoming knowledgeable of the program goals and activities and by working to reinforce their children's training at home.

(d) COORDINATION WITH ADULT EDUCATION ACT.—Programs of parental involvement shall coordinate, to the extent possible, with programs funded under the Adult Education Act.

(e) ACCESSIBILITY REQUIREMENT.—Information, programs, and activities for parents pursuant to this section shall be provided, to the extent practicable, in a language and form which the parents understand.

(20 U.S.C. 2726)

SEC. 1017. PARTICIPATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS.

(a) GENERAL REQUIREMENTS.—To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall, after timely and meaningful consultation with appropriate private school officials, make provisions for including special educational services and arrangements (such as dual enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment) in which such children can participate and which meet the requirements of sections

1011(a), 1012(b)(1), 1013, 1014, and 1018(b). Expenditures for educational services and arrangements pursuant to this section for educationally deprived children in private schools shall be equal (taking into account the number of children to be served and the special educational needs of such children) to expenditures for children enrolled in the public schools of the local educational agency.

(b) Bypass Provision.—

(1) If a local educational agency is prohibited by law from providing for the participation in special programs for educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a), the Secretary shall waive such requirements, and shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a).

(2) If the Secretary determines that a local educational agency has substantially failed to provide for the participation on an equitable basis of educationally deprived children enrolled in private elementary and secondary schools as required by subsection (a), the Secretary shall arrange for the provision of services to such children through arrangements which shall be subject to the requirements of subsection (a), upon which determination the provisions of subsection (a) shall be waived.

(3)(A) The Secretary shall develop and implement written procedures for receiving, investigating, and resolving complaints from parents, teachers, or other concerned organizations or individuals concerning violations of this section. The Secretary shall investigate and resolve each such complaint within 120 days after receipt of the complaint.

(B) When the Secretary arranges for services pursuant to this subsection, the Secretary shall, after consultation with the appropriate public and private school officials, pay to the provider the cost of such services, including the administrative cost of arranging for such services, from the appropriate allocation or allocations under this chapter.

(C) Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State or local educational agency the amount the Secretary estimates would be necessary to pay the cost of such services.

(D) Any determination by the Secretary under this section shall continue in effect until the Secretary determines that there will no longer be any failure or inability on the part of the local educational agency to meet the requirements of subsec- tion (a).

(4)(A) The Secretary shall not take any final action under this subsection until the State educational agency and local educational agency affected by such action have had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or a designee to show cause why such action should not be taken.

(B) If a State or local educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A) of this paragraph, it may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of title 28, United States Code.

(C) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Upon the filing of a petition under subparagraph (B), the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(c) PRIOR DETERMINATION.—Any bypass determination by the Secretary under title I of the Elementary and Secondary Education Act of 1965, as in effect prior to July 1, 1988, or chapter 1 of the Education Consolidation and Improvement Act of 1981 shall remain in effect to the extent consistent with the purposes of this chapter.

(d) CAPITAL EXPENSES.—

(1) A local educational agency may apply to the State educational agency for payments for capital expenses consistent with the provisions of this subsection. State educational agencies shall distribute funds to local educational agencies based on the degree of need as set forth in the application. Such an application shall contain information on such capital expenses by fiscal year and shall contain an assurance that any funds received pursuant to this subsection shall be used solely for purposes of the program authorized by this chapter.

(2)(A) From the amount appropriated for the purposes of this subsection for any fiscal year, the amount which each State shall be eligible to receive shall be an amount which bears the same ratio to the amount appropriated as the number of children enrolled in private schools who were served under chapter 1 of the Education Consolidation and Improvement Act of 1981 in the State during the period July 1, 1984 through June 30, 1985, bears to the total number of such children served during such period in all States.

(B) Amounts which are not used by a State for the purposes of this subsection shall be reallocated by the Secretary among other States on the basis of need.

(3) There is authorized to be appropriated $30,000,000 for fiscal year 1988, $40,000,000 for the fiscal year 1989, and such sums as may be necessary for each of the fiscal years 1990, 1991, 1992, and 1993. Any sums appropriated under this provision shall be used for increases in capital expenses paid from funds under chapter 1 of the Education Consolidation and Improvement Act or this section subsequent to July 1, 1985, of local educational agencies in providing the instructional services required under section 557 of the Education Consolidation and Improvement Act and this section, when without such funds, services to private schoolchildren would have been or have been reduced or would be reduced or adversely affected.

(4) For the purposes of this subsection, the term "capital expenses" is limited to expenditures for noninstructional goods and services such as the purchase, lease and renovation of real and personal property (including but not limited to mobile educational units and leasing of neutral sites or space), insurance and maintenance costs, transportation, and other comparable goods and services.

(20 U.S.C. 2727)

SEC. 1018. FISCAL REQUIREMENTS.

(a) MAINTENANCE OF EFFORT.—

(1) Except as provided in paragraph (2), a local educational agency may receive funds under this chapter for any fiscal year only if the State educational agency finds that either the combined fiscal effort per student or the aggregate expenditures of that agency and the State with respect to the provision of free public education by that agency for the preceding fiscal year was not less than 90 percent of such combined fiscal effort or aggregate expenditures for the second preceding fiscal year.

(2) The State educational agency shall reduce the amount of the allocation of funds under this chapter in any fiscal year in the exact proportion to which a local educational agency fails to meet the requirement of paragraph (1) by falling below 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to such local agency), and no such lesser amount shall be used for computing the effort required under paragraph (1) for subsequent years.

(3) Each State educational agency may waive, for 1 fiscal year only, the requirements of this subsection if the State educational agency determines that such a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the local educational agency.

(b) FEDERAL FUNDS TO SUPPLEMENT, NOT SUPPLANT REGULAR NON-FEDERAL FUNDS.—A State educational agency or other State agency in operating its State level programs or a local educational agency may use funds received under this chapter only so as to supplement and, to the extent practicable, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this chapter and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection, no State educational agency, other State agency, or local educational agency shall be required to provide services under this chapter through use of a particular instructional method or in a particular instructional setting.

(c) Comparability of Services.—

(1) A local educational agency may receive funds under this chapter only if State and local funds will be used in the district of such agency to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such district which are not receiving funds under this chapter. Where all school attendance areas in the district of the agency are designated as project areas, the agency may receive such funds only if State and local funds are used to provide services which, taken as a whole, are substantially comparable in each project area.

(2)(A) A local educational agency shall be considered to have met the requirements of paragraph (1) if it has filed with the State educational agency a written assurance that it has established and implemented—

(i) a districtwide salary schedule;

(ii) a policy to ensure equivalence among schools in teachers, administrators, and auxiliary personnel; and

(iii) a policy to ensure equivalence among schools in the provision of curriculum materials and instructional supplies.

(B) Unpredictable changes in student enrollment or personnel assignments which occur after the beginning of a school year shall not be included as a factor in determining comparability of services.

(3) Each educational agency shall develop procedures for compliance with the provisions of this subsection, and shall annually maintain records documenting compliance. Each State educational agency shall monitor the compliance of local educational agencies within the States with respect to the requirements of this subsection.

(4) Each local educational agency with not more than 1 building for each grade span shall not be subject to the provisions of this subsection.

(5) Each local educational agency which is found to be out of compliance with this subsection shall be subject to withholding or repayment of funds only to the amount or percentage by which the local educational agency has failed to comply.

(d) Exclusion of Special State and Local Program Funds.—

(1)(A) For the purposes of determining compliance with the requirements of subsections (b) and (c), a local educational agency or a State agency operating a program under part D of this chapter may exclude State and local funds expended for carrying out special programs to meet the educational needs of educationally deprived children including compensatory educa-

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tion for educationally deprived children after prior determination pursuant to paragraphs (3) and (4) of this subsection that such programs meet the requirements of subparagraph (B).

(B) A State or local program meets the requirements of this subparagraph if it is similar to programs assisted under this part. The Secretary shall consider a State or local program to be similar to programs assisted under this part if—

(i) all children participating in the program are educationally deprived,

(ii) the program is based on similar performance objectives related to educational achievement and is evaluated in a manner consistent with those performance objectives,

(iii) the program provides supplementary services designed to meet the special educational needs of the children who are participating,

(iv) the local educational agency keeps such records and affords such access thereto as are necessary to assure the correctness and verification of the requirements of this subparagraph, and

(v) the State educational agency monitors performance under the program to assure that the requirements of this subparagraph are met.

(2)(A) For the purpose of determining compliance with the requirements of subsection (c), a local educational agency may exclude State and local funds expended for—

(i) bilingual education for children of limited English proficiency,

(ii) special education for handicapped children, and

(iii) certain State phase-in programs as described in subparagraph (B).

(B) A State education program which is being phased into full operation meets the requirements of this subparagraph if the Secretary is satisfied that—

(i) the program is authorized and governed specifically by the provisions of State law;

(ii) the purpose of the program is to provide for the comprehensive and systematic restructuring of the total educational environment at the level of the individual school;

(iii) the program is based on objectives, including but not limited to, performance objectives related to educational achievement and is evaluated in a manner consistent with those objectives;

(iv) parents and school staff are involved in comprehensive planning, implementation, and evaluation of the program;

(v) the program will benefit all children in a particular school or grade-span within a school;

(vi) schools participating in a program describe, in a school level plan, program strategies for meeting the special educational needs of educationally deprived children;

(vii) at all times during such phase-in period at least 50 percent of the schools participating in the program are the schools serving project areas which have the greatest

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number or concentrations of educationally deprived children or children from low-income families;

(viii) State funds made available for the phase-in program will supplement, and not supplant, State and local funds which would, in the absence of the phase-in program, have been provided for schools participating in such program;

(ix) the local educational agency is separately accountable, for purposes of compliance with the clauses of this subparagraph, to the State educational agency for any funds expended for such program; and

(x) the local educational agencies carrying out the program are complying with the clauses of this subparagraph and the State educational agency is complying with applicable provisions of this paragraph.

(3) The Secretary shall make an advance determination of whether or not a State program meets the requirements of this subsection. The Secretary shall require each State educational agency to submit the provisions of State law together with implementing rules, regulations, orders, guidelines, and interpretations which are necessary for an advance determination. The Secretary's determination shall be in writing and shall include the reasons for the determination. Whenever there is any material change in pertinent State law affecting the program, the State educational agency shall submit such changes to the Secretary.

(4) The State educational agency shall make an advance determination of whether or not a local program meets the requirements of this subsection. The State educational agency shall require each local educational agency to submit the provisions of local law, together with implementing rules, regulations, guidelines, and interpretations which are necessary to make such an advance determination. The State educational agency's determination shall be in writing and shall include the reasons for the determination. Whenever there is any material change in pertinent local law affecting the program, the local educational agency shall submit such changes to the State educational agency.

(20 U.S.C. 2728)

SEC. 1019. EVALUATIONS.

(a) LOCAL EVALUATION.—Each local educational agency shall—

(1) evaluate the effectiveness of programs assisted under this part, in accordance with national standards developed according to section 1435, at least once every 3 years (using objective measurement of individual student achievement in basic skills and more advanced skills, aggregated for the local educational agency as a whole) as an indicator of the impact of the program;

(2) submit such evaluation results to the State educational agency at least once during each 3-year application cycle;

(3) determine whether improved performance under paragraph (1) is sustained over a period of more than one program year.

(b) State Evaluations.—In accordance with national standards, each State educational agency shall—

(1) conduct an evaluation (based on local evaluation data collected under subsection (a) and sections 1107(b), 1202(a)(6), and 1242(d)) of the programs assisted under this chapter at least every 2 years, submit that evaluation to the Secretary and make public the results of that evaluation;

(2) inform local educational agencies, in advance, of the specific evaluation data that will be needed and how it may be collected; and

(3) collect data on the race, age, gender, and number of children with handicapping conditions served by the programs assisted under this chapter and on the number of children served by grade-level under the programs assisted under this chapter and annually submit such data to the Secretary.

(c) Special Condition.—Projects funded under this part that serve only preschool, kindergarten, or first grade students or students in such grade levels who are included in projects serving children above such grade levels shall not be subject to the requirements of subsection (a).

(20 U.S.C. 2729)

SEC. 1020. STATE EDUCATIONAL PROGRAM IMPROVEMENT PLAN.

(a) Plan Requirements.—A State educational agency which receives funds under part A, part C, and part E of this chapter shall develop, in consultation with a committee of practitioners constituted pursuant to section 1451(b) of this chapter, a plan to ensure implementation of the provisions of this section and section 1021. Each such plan shall contain, but shall not be limited to—

(1) the objective measures and standards the State educational agency and other agencies receiving funds under part A, part C, and part E of this chapter will use to assess aggregate performance pursuant to section 1021, and may include implementation of section 1019;

(2) the means the State educational agency will use to develop joint plans with local educational agencies which have identified, pursuant to section 1021(b), schools in need of program improvement to attain satisfactory student progress, the timetable for developing and implementing such plans (within parameters defined pursuant to section 1431) and the program improvement assistance that will be provided to such schools pursuant to section 1021. Such program improvement assistance may include, but shall not be limited to, training and retraining of personnel, development of curricula that has shown promise in similar schools, replication of promising practices in effective schools models, improving coordination between programs assisted under this chapter and the regular school program, and the development of innovative strategies to enhance parental involvement.

(b) Dissemination and Availability of Plan.—(1) The State educational agency shall disseminate the plan developed under this subsection to all local educational agencies and other State agencies receiving funds under this chapter.

(2) The State educational program improvement plan shall be available at the State educational agency for inspection by the Secretary and may be amended by the State educational agency after consultation with a committee of practitioners when necessary.

(c) Availability of Funds.—In any fiscal year for which appropriations are made pursuant to section 1405, the State educational agency shall fully implement the program improvement activities described in sections 1020 and 1021. In any fiscal year for which appropriations are not made, the State educational agency shall conduct, at a minimum, the activities required under section 1021(d), and other program improvement activities to the extent practicable.

(20 U.S.C. 2730)

SEC. 1021. PROGRAM IMPROVEMENT.

(a) Local Review.—Each local educational agency shall—

(1) conduct an annual review of the program's effectiveness in improving student performance for which purpose the local educational agency shall use outcomes developed pursuant to section 1012 and subsection (b) of this section, and make the results of such review available to teachers, parents of participating children, and other appropriate parties;

(2) determine whether improved performance under paragraph (1) is sustained over a period of more than one program year;

(3) use the results of such review and of evaluation pursuant to section 1019 in program improvement efforts required by section 1021(b); and

(4) annually assess through consultation with parents, the effectiveness of the parental involvement program and determine what action needs to be taken, if any, to increase parental participation.

(b) School Program Improvement.—(1) With respect to each school which does not show substantial progress toward meeting the desired outcomes described in the local educational agency's application under section 1012(a) or shows no improvement or a decline in aggregate performance of children served under this chapter for one school year as assessed by measures developed pursuant to section 1019(a) or subsection (a), pursuant to the program improvement timetable developed under sections 1020 and 1431, the local educational agency shall—

(A) develop and implement in coordination with such school a plan for program improvement which shall describe how such agency will identify and modify programs funded under this chapter for schools and children pursuant to this section and which shall incorporate those program changes which have the greatest likelihood of improving the performance of educationally disadvantaged children, including—

(i) a description of educational strategies designed to achieve the stated program outcomes or to otherwise improve the performance and meet the needs of eligible children; and

(ii) a description of the resources, and how such resources will be applied, to carry out the strategies selected, including, as appropriate, qualified personnel, inservice training, curriculum materials, equipment, and physical facilities; and, where appropriate—

(I) technical assistance;

(II) alternative curriculum that has shown promise in similar schools;

(III) improving coordination between part A and part C of this chapter and the regular school program;

(IV) evaluation of parent involvement;

(V) appropriate inservice training for staff paid with funds under this chapter and other staff who teach children served under this chapter; and

(VI) other measures selected by the local educational agency; and

(B) submit the plan to the local school board and the State educational agency, and make it available to parents of children served under this chapter in that school.

(2) A school which has 10 or fewer students served during an entire program year shall not be subject to the requirements of this subsection.

(c) DISCRETIONARY ASSISTANCE.—The local educational agency may apply to the State educational agency for program improvement assistance funds authorized under section 1405.

(d) STATE ASSISTANCE TO LOCAL EDUCATIONAL AGENCIES.—(1) If after the locally developed program improvement plan shall have been in effect according to the timetable established under sections 1020 and 1431, the aggregate performance of children served under this chapter in a school does not meet the standards stated in subsections (a) and (b), the local educational agency shall, with the State educational agency, and in consultation with school staff and parents of participating children, develop and implement a joint plan for program improvement in that school until improved performance is sustained over a period of more than 1 year.

(2) The State educational agency shall ensure that program improvement assistance is provided to each school identified under paragraph (1).

(e) LOCAL CONDITIONS.—The local educational agency and the State educational agency, in performing their responsibilities under this section, shall take into consideration—

(1) the mobility of the student population,

(2) the extent of educational deprivation among program participants which may negatively affect improvement efforts,

(3) the difficulties involved in dealing with older children in secondary school programs funded under this chapter,

(4) whether indicators other than improved achievement demonstrate the positive effects on participating children of the activities funded under this chapter, and

(5) whether a change in the review cycle pursuant to section 1019 or 1021(a)(1) or in the measurement instrument used or other measure-related phenomena has rendered results invalid or unreliable for that particular year.

(f) Student Program Improvement.—On the basis of the evaluations and reviews under sections 1019(a)(1) and 1021(a)(1), each local educational agency shall—

(1) identify students who have been served for a program year and have not met the standards stated in subsections (a) and (b),

(2) consider modifications in the program offered to better serve students so identified, and

(3) conduct a thorough assessment of the educational needs of students who remain in the program after 2 consecutive years of participation and have not met the standards stated in subsection (a).

(g) Program Improvement Assistance.—In carrying out the program improvement and student improvement activities required in subsections (a), (b), (c), and (d), local educational agencies and State educational agencies shall utilize the resources of the regional technical assistance centers and appropriate regional rural assistance programs established by section 1456 to the full extent such resources are available.

(h) Further Action.—If the State educational agency finds that, consistent with the program improvement timetable established under sections 1020 and 1431, after one year under the joint plan developed pursuant to subsection (d), including services in accordance with section 1017, a school which continues to fall below the standards for improvement stated in subsections (a) and (b) with regard to the aggregate performance of children served under part A, part C, and part E of this chapter, the State educational agency shall, with the local educational agency, review the joint plan and make revisions which are designed to improve performance, and continue to do so each consecutive year until such performance is sustained over a period of more than one year. Nothing in this section or section 1020 shall be construed to give the State any authority concerning the educational program of a local educational agency that does not otherwise exist under State law.

(i) Mutual Agreement.—Before any joint plan may be implemented under subsection (d) and subsection (h) both the local educational agency and State educational agency must approve such plan.

(20 U.S.C. 2731)

PART B—EVEN START PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

SEC. 1051. STATEMENT OF PURPOSE.

It is the purpose of this part to improve the educational opportunities of the Nation's children and adults by integrating early childhood education and adult education for parents into a unified program to be referred to as "Even Start". The program shall be implemented through cooperative projects that build on existing community resources to create a new range of services.

(20 U.S.C. 2741)

SEC. 1052. PROGRAM AUTHORIZATION.

(a) GRANTS BY THE SECRETARY.—In any fiscal year in which the appropriations for this part do not equal or exceed $50,000,000, the Secretary is authorized, in accordance with the provisions of this part which are not inconsistent with the provisions of this subsection, to make grants to local educational agencies or consortia of such agencies to carry out Even Start programs.

(b) STATE GRANT PROGRAM.—In any fiscal year in which the appropriations for this part equal or exceed $50,000,000, the Secretary is authorized, in accordance with the provisions of this part, to make grants to States from allocations under section 1053 to enable States to carry out Even Start programs.

(c) DEFINITION.—For the purpose of this part, the term "State" includes each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(20 U.S.C. 2742)

SEC. 1053. ALLOCATION.

(a) RESERVATION FOR MIGRANT PROGRAMS.—The Secretary shall first reserve an amount equal to 3 percent of such amount for programs consistent with the purpose of this part for migrant children. Programs for which funds are reserved under this subsection shall be conducted through the Office of Migrant Education.

(b) STATE ALLOCATION.—Except as provided in section 1052(a) and subsection (c) of this section, each State shall be eligible to receive a grant under this part in each fiscal year that bears the same ratio to the remainder of the amount appropriated under section 1052(b) in that fiscal year as the amount allocated under section 1005 of this Act to the local educational agencies in the State bears to the total amount allocated to such agencies in all States.

(c) STATE MINIMUM.—(1) Subject to the provisions of paragraph (2), no State shall receive less than the greater of—

(A) one-half of one percent of the amount appropriated for this part and allocated under subsection (b) for any fiscal year; or

(B) $250,000.

(2)(A) No State shall, by reason of the application of the provisions of paragraph (1)(A) of this subsection, be allotted more than—

(i) 150 percent of the amount that the State received in the fiscal year preceding the fiscal year for which the determination is made, or

(ii) the amount calculated under subparagraph (B),

whichever is less.

(B) For the purpose of subparagraph (A)(ii), the amount for each State equals—

(i) the number of children in such State counted for purposes of this part in the fiscal year specified in subparagraph (A), multiplied by

(ii) 150 percent of the national average per pupil payment made with funds available under this part for that year.

(20 U.S.C. 2743)

SEC. 1054. USES OF FUNDS.

(a) In General.—In carrying out the program under this part, funds made available to local educational agencies, in collaboration with, where appropriate, institutions of higher education, community-based organizations, the appropriate State educational agency, or other appropriate nonprofit organizations, shall be used to pay the Federal share of the cost of providing family-centered education programs which involve parents and children in a cooperative effort to help parents become full partners in the education of their children and to assist children in reaching their full potential as learners.

(b) Program Elements.—Each program assisted under this part shall include—

(1) the identification and recruitment of eligible children;

(2) screening and preparation of parents and children for participation, including testing, referral to necessary counseling, and related services;

(3) design of programs and provision of support services (when unavailable from other sources) appropriate to the participants' work and other responsibilities, including—

(A) scheduling and location of services to allow joint participation by parents and children;

(B) child care for the period that parents are involved in the program provided for under this part; and

(C) transportation for the purpose of enabling parents and their children to participate in the program authorized by this part;

(4) the establishment of instructional programs that promote adult literacy, training parents to support the educational growth of their children, and preparation of children for success in regular school programs;

(5) provision of special training to enable staff to develop the skills necessary to work with parents and young children in the full range of instructional services offered through this part (including child care staff in programs enrolling children of participants under this part on a space available basis);

(6) provision of and monitoring of integrated instructional services to participating parents and children through home-based programs; and

(7) coordination of programs assisted under this part with programs assisted under this chapter and any relevant programs under chapter 2 of this title, the Adult Education Act, the Individuals with Disabilities Education Act, the Job Training Partnership Act, and with the Head Start program, volunteer literacy programs, and other relevant programs.

(c) Federal Share Limitation.—The Federal share under this part may be—

(1) not more than 90 percent of the total cost of the program in the first year the local educational agency receives assistance under this part,

(2) 80 percent in the second such year,

(3) 70 percent in the third such year, and

(4) 60 percent in the fourth and any subsequent such year.

Funds may not be used for indirect costs. The remaining cost may be obtained from any source other than funds made available for programs under this title.

(20 U.S.C. 2744)

SEC. 1055. ELIGIBLE PARTICIPANTS.

Eligible participants shall be—

(1) a parent or parents who are eligible for participation in an adult basic education program under the Adult Education Act; and

(2) the child or children (aged 1 to 7, inclusive), of any individual under paragraph (1), who reside in a school attendance area designated for participation in programs under part A.

(20 U.S.C. 2745)

SEC. 1056. APPLICATIONS.

(a) SUBMISSION.—To be eligible to receive a grant under this part a local educational agency shall submit an application to the Secretary under section 1052(a) and to the State educational agency under section 1052(b) in such form and containing or accompanied by such information as the Secretary or the State educational agency, as the case may be, may require.

(b) REQUIRED DOCUMENTATION.—Such application shall include documentation that the local educational agency has the qualified personnel required—

(1) to develop, administer, and implement the program required by this part, and

(2) to provide special training necessary to prepare staff for the program.

(c) PLAN.—Such application shall also include a plan of operation for the program which includes—

(1) a description of the program goals;

(2) a description of the activities and services which will be provided under the program (including training and preparation of staff);

(3) a description of the population to be served and an estimate of the number of participants;

(4) if appropriate, a description of the collaborative efforts of the institutions of higher education, community-based organizations, the appropriate State educational agency, private elementary schools, or other appropriate nonprofit organizations in carrying out the program for which assistance is sought;

(5) a statement of the methods which will be used—

(A) to ensure that the programs will serve those eligible participants most in need of the activities and services provided by this part;

(B) to provide services under this part to special populations, such as individuals with limited English proficiency and individuals with handicaps; and

(C) to encourage participants to remain in the programs for a time sufficient to meet program goals; and

(6) a description of the methods by which the applicant will coordinate programs under this part with programs under chapter 1 and chapter 2, where appropriate, of this title, the Adult Education Act, the Job Training Partnership Act, and with Head Start programs, volunteer literacy programs, and other relevant programs.

(20 U.S.C. 2746)

SEC. 1057. AWARD OF GRANTS.

(a) Selection Process.—The Secretary or each State educational agency, as the case may be, shall appoint a review panel that will award grants on the basis of proposals which—

(1) are most likely to be successful in meeting the goals of this part;

(2) serve the greatest percentage of eligible children and parents as described in section 1055;

(3) demonstrate the greatest degree of cooperation and coordination between a variety of relevant service providers in all phases of the program;

(4) submit budgets which appear reasonable, given the scope of the proposal;

(5) demonstrate the local educational agency's ability to provide additional funding under section 1054(c);

(6) are representative of urban and rural regions of the State or of the United States, as the case may be; and

(7) show the greatest promise for providing models which may be transferred to other local educational agencies.

(b) Review Panel.—A review panel shall, to the extent practicable, consist of 7 members as follows:

(1) an early childhood education professional;

(2) an adult education professional;

(3) a representative of parent-child education organizations;

(4) a representative of community-based literacy organizations;

(5) a member of a local board of education;

(6) a representative of business and industry with a commitment to education; and

(7) an individual involved in the implementation of programs under this chapter within the State.

The panel shall contain members described in paragraphs (1), (2), (6), and (7).

(c) Equitable Distribution of Assistance.—In approving grants under this part under section 1052(a), the Secretary shall assure an equitable distribution of assistance among the States, among urban and rural areas of the United States, and among urban and rural areas of a State.

(d) Duration.—(1) Grants may be awarded for a period not to exceed 4 years. In any application from a local educational agency for a grant to continue a project for the second, third, or fourth fiscal year following the first fiscal year in which a grant was awarded to such local educational agency, the Secretary or the State educational agency, as the case may be, shall review the progress being made toward meeting the objectives of the project. The Secretary or the State educational agency, as the case may be, may refuse to award a grant if the Secretary or such agency finds that sufficient progress has not been made toward meeting such objectives, but only after affording the applicant notice and an opportunity for a hearing.

(2) The Secretary shall establish criteria for carrying out the provisions of paragraph (1) in the transition fiscal year whenever the provisions of section 1052(b) apply to authorized State grant programs.

(20 U.S.C. 2747)

SEC. 1058. EVALUATION.

(a) INDEPENDENT ANNUAL EVALUATION.—The Secretary shall provide for the annual independent evaluation of programs under this part to determine their effectiveness in providing—

(1) services to special populations;
(2) adult education services;
(3) parent training;
(4) home-based programs involving parents and children;
(5) coordination with related programs; and
(6) training of related personnel in appropriate skill areas.

(b) CRITERIA.—

(1) Each evaluation shall be conducted by individuals not directly involved in the administration of the program or project operated under this part. Such independent evaluators and the program administrators shall jointly develop evaluation criteria which provide for appropriate analysis of the factors under subsection (a). When possible, each evaluation shall include comparisons with appropriate control groups.

(2) In order to determine a program's effectiveness in achieving its stated goals, each evaluation shall contain objective measures of such goals and, whenever feasible, shall obtain the specific views of program participants about such programs.

(c) REPORT TO CONGRESS AND DISSEMINATION.—The Secretary shall prepare and submit to the Congress a review and summary of the results of such evaluations not later than September 30, 1993. The annual evaluations shall be submitted to the National Diffusion Network for consideration for possible dissemination.

(20 U.S.C. 2748)

SEC. 1059. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for the purposes of this part $50,000,000 for the fiscal year 1989 and such sums as may be necessary for each of the fiscal years 1990, 1991, 1992, and 1993.

(20 U.S.C. 2749)

PART C—SECONDARY SCHOOL PROGRAMS FOR BASIC SKILLS IMPROVEMENT AND DROPOUT PREVENTION AND REENTRY

SEC. 1101. PURPOSE.

It is the purpose of this subpart to provide additional assistance to local educational agencies with high concentrations of low-income children, low-achieving children, or school dropouts to improve the achievement of educationally disadvantaged children enrolled in secondary schools of such agencies, and to reduce the number of youths who do not complete their elementary and secondary education.

(20 U.S.C. 2761)

SEC. 1102. ALLOCATION.

(a) Reservations.—From the amount appropriated under section 1110 for each of the fiscal years 1992 and 1993, the Secretary shall first reserve—

(1) an amount equal to 3 percent of such amount for programs consistent with the purpose of this part for school dropout prevention and reentry programs and secondary school basic skills improvement programs for migrant children, to be conducted through the Office of Migrant Education; and

(2) an amount equal to 5 percent of such amount for replication and technical assistance activities.

(b) State Allocation.—Except as provided in subsection (c), each State shall be eligible to receive a grant under this part in each fiscal year that bears the same ratio to the remainder of the amount appropriated in that fiscal year as the amount allocated under section 1005 of this Act to the local educational agencies in the State bears to the total amount allocated to such agencies in all States.

(c) State Minimum.—(1) No State shall receive less than the greater of—

(A) one-quarter of 1 percent of the amount appropriated for this part and allocated under subsection (b) for any fiscal year; or

(B) $250,000.

(2)(A) No State shall, by reason of the application of the provisions of paragraph (1)(A) of this subsection, be allotted more than—

(i) 150 percent of the amount that the State received in the fiscal year preceding the fiscal year for which the determination is made, or

(ii) the amount calculated under subparagraph (B),

whichever is less.

(B) For the purpose of subparagraph (A)(ii), the amount for each State equals—

(i) the number of children in such State counted for purposes of this part in the fiscal year specified in subparagraph (A), multiplied by

(ii) 150 percent of the national average per pupil payment made with funds available under this part for that year.

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(d) **Local Educational Agency Allocation.**—Each State educational agency shall allocate funds among local educational agencies in the State on the basis of—

(1) the eligibility of such agency for funds under section 1005 of this Act; and

(2) the criteria described in section 1105.

Each local educational agency may carry out the activities described in section 1103 in cooperation with community-based organizations.

(e) **State Administration.**—A State may reserve not more than 5 percent of the amounts available under this part for any fiscal year for State administrative costs.

(20 U.S.C. 2762)

SEC. 1103. USES OF FUNDS.

(a) **General Rule.**—

(1) A local educational agency may use—

(A) not to exceed 50 percent of funds paid under this part in any fiscal year for dropout prevention and reentry activities pursuant to subsection (c); and

(B) the remainder of such funds for secondary schools basic skills improvement activities pursuant to subsection (b).

(2) A community-based organization shall use all funds paid under this part in any fiscal year for dropout prevention and reentry activities pursuant to subsection (c).

(b) **Basic Skills for Secondary Schools.**—Funds made available under this subpart may be used—

(1) to initiate or expand programs designed to meet the special educational needs of secondary school students and to help such students attain grade level proficiency in basic skills, and, as appropriate, learn more advanced skills;

(2) to develop innovative approaches for—

(A) surmounting barriers that make secondary school programs under this subpart difficult for certain students to attend and difficult for secondary schools to administer, such as scheduling problems; and

(B) courses leading to successful completion of the general education development test or of graduation requirements;

(3) to develop and implement innovative programs involving community-based organizations or the private sector, or both, to provide motivational activities, preemployment training, or transition-to-work activities;

(4) to provide programs for eligible students outside the school, with the goal of reaching school dropouts who will not reenter the traditional school, for the purpose of providing compensatory education, basic skills education, or courses for general educational development;

(5) to use the resources of the community to assist in providing services to the target population;

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(6) to provide training for staff who will work with the target population on strategies and techniques for identifying, instructing, and assisting such students;

(7) to provide guidance and counseling activities, support services, exploration of postsecondary educational opportunities, youth employment activities, and other student services which are necessary to assist eligible students; and

(8) to recruit, train, and supervise secondary school students (including the provision of stipends to students in greatest need of financial assistance) to serve as tutors of other students eligible for services under this subpart and under part A, in order to assist such eligible students with homework assignments, provide instructional activities, and foster good study habits and improved achievement.

(c) USES OF FUNDS FOR SCHOOL DROPOUT PREVENTION AND REENTRY PROJECTS.—Funds made available under this subsection may be used for—

(1) effective programs which identify potential student dropouts and prevent them from dropping out of elementary and secondary school;

(2) effective programs which identify and encourage children who have already dropped out to reenter school and complete their elementary and secondary education;

(3) effective programs for early intervention designed to identify at-risk students in elementary and early secondary schools;

(4) model systems for collecting and reporting information to local school officials on the number, ages, and grade levels of the children not completing their elementary and secondary education and the reasons why such children have dropped out of school;

(5) school dropout programs which include coordinated services and activities with programs of vocational education, adult basic education, and programs under the Job Training Partnership Act;

(6) projects which are carried out in consortia with a community-based organization, any nonprofit private organization, institution of higher education, State educational agency, State and local public agencies, private industry councils (established under the Job Training Partnership Act), museum, library, or educational television or broadcasting station, or community-based organization; or

(7) any of the activities described in section 6005 or 6006 of title VI.

(d) WITHIN-STATE ALLOCATION.—

(1) Each State educational agency, from funds received under this part—

(A) shall first reserve an amount equal to 5 percent of such funds for programs consistent with the purpose of this part for school dropout prevention and reentry programs conducted by community-based organizations that have demonstrated effectiveness in programs for dropout prevention and reentry activities or basic skills improvement activities; and

(B) shall then allocate funds among local educational agencies in the State on the basis of—

(i) the eligibility of such agency for funds under section 1005; and

(ii) the criteria described in section 1105.

(2) Each local educational agency may carry out the activities described in section 1103 in cooperation with community-based organizations.

(20 U.S.C. 2763)

SEC. 1104. APPLICATIONS.

(a) Application Required.—Any local educational agency or community-based organization which desires to receive a grant under this part shall submit to the State educational agency an application which describes the program to be supported with funds under this part and complies with the provisions of subsection (b).

(b) Contents of Application.—Each application submitted under subsection (a) shall—

(1) contain a plan that describes specific proposals for a program to increase the secondary school completion rate of the State by not later than January 1, 2001, by a percentage equal to one-half the difference between 100 percent and the secondary school completion rate for individuals in the State aged 18 to 35, inclusive, as of January 1, 1990;

(2) assure that requirements for obtaining a certificate of graduation from a school providing secondary education or its equivalent will not be lowered;

(3) describe the program goals and the manner in which funds will be used to initiate or expand services to secondary school students, school dropouts, and potential school dropouts;

(4) describe the activities and services which will be provided by the program (including documentation to demonstrate that the local educational agency or community-based organization has the qualified personnel required to develop, administer, and implement the program under this part);

(5) assure that the programs will be conducted in schools or areas with the greatest need for assistance, in terms of achievement levels, poverty rates, or school dropout rates;

(6) assure that the programs will serve those eligible students most in need of the activities and services provided by this part;

(7) assure that services will be provided under this part, as appropriate, to special populations, such as individuals with limited English proficiency and individuals with handicaps;

(8) assure that parents of eligible students will be involved in the development and implementation of programs under this part;

(9) describe the methods by which the applicant will coordinate programs under this part with programs for the eligible student population operated by the local educational agency concerned or community-based organizations, as appropriate, social service organizations and agencies, private sector entities, and other agencies, organizations, and institutions, and

with programs conducted under the Carl D. Perkins Vocational Education Act, the Adult Education Act, the Job Training Partnership Act, and other relevant Acts;

(10) assure that, if feasible, the local educational agency or community-based organization will enter into arrangements with local businesses, labor organizations, or chambers of commerce under which such businesses and organizations will help secure employment for graduates of schools operating projects under this part;

(11) assure that to the extent consistent with the number of students in the school district of the local educational agency concerned who are enrolled in private secondary schools, such agency or community-based organization shall, after timely and meaningful consultation with appropriate private school officials, make provision for including such services and arrangements for the benefit of such students as will assure their equitable participation in the purposes and benefits of this part; and

(12) provide such other information as the State educational agency may require to determine the nature and quality of the proposed project and the applicant's ability to carry it out.

(c) SPECIAL RULE.—If the Secretary determines that a local educational agency has substantially failed to comply with paragraph (9) (by reason of State law or otherwise) or is unwilling to provide for such participation on an equitable basis, the Secretary shall waive such requirement, and, subject to the provisions of section 1017(b) of part A of this chapter, shall arrange for the provision of services to such students.

(d) TIME FOR SUBMISSION OF APPLICATIONS.—Each State shall submit to the Secretary—

(1) an initial application that covers a 3-year period by not later than January 1, 1992;

(2) an initial or a renewal application that covers a 3-year period by not later than January 1, 1995; and

(3) a renewal application that covers a 3-year period by not later than January 1, 1998.

(20 U.S.C. 2764)

SEC. 1105. AWARD OF GRANTS.

(a) GENERAL AUTHORITY.—Each State educational agency shall award grants to local educational agencies and community-based organizations within the State which—

(1) demonstrate the greatest need for services provided under this part based on their numbers of low-income children, numbers of low-achieving children, or numbers of school dropouts;

(2) are representative of urban and rural regions of the State;

(3) offer innovative approaches to improving achievement among eligible youth or offer approaches which show promise for replication and dissemination; and

(4) offer innovative approaches to reducing the number of school dropouts.

(b) Priorities for Grants to Community-Based Organizations.—

(1) The State educational agency shall give priority for grants from amounts reserved under section 1103(d)(1)(A) to community-based organizations that intend to use funds under the grant to establish or operate model secondary school community education employment centers to meet the education needs of inner-city, low-income youths or rural youths by awarding grants to eligible recipients to establish community education employment centers to provide students with the education, skills, support services, and enrichment necessary to ensure—

(A) graduation from secondary school;

(B) successful transition from articulated vocational and academic programs to a broad range of post secondary institutions;

(C) employment, including military service; and

(D) integration into America's economic mainstream.

(2) Each center that is assisted with a grant under this part shall offer—

(A) a comprehensive program of confidential guidance counseling;

(B) professional staff members who demonstrate the highest academic, teaching, guidance, or administrative standards, as appropriate; and

(C) active and informed parental and community participation.

(20 U.S.C. 2765)

SEC. 1106. REPORTS; DEVELOPMENT OF INFORMATION BASE.

(a) Reports to States.—Each local educational agency or individual school that receives assistance under a grant made under this part shall annually submit a report to the State describing activities carried out with such assistance and progress toward increasing the secondary school completion rate achieved as a result of such activities.

(b) Reports to Secretary.—Each State shall annually submit a report to the Secretary describing activities carried out with assistance received under this section and progress achieved toward increasing the secondary school completion rate as a result of such activities.

(c) Development of Information Base.—From information contained in the reports required under subsection (b), the Secretary shall create an information base containing information on dropout prevention programs for use by State and local educational agencies, elementary and secondary schools, and interested community organizations in the development or refinement of dropout prevention programs. The Secretary shall ensure that such information base is easily accessible to such agencies, schools, and organizations.

(20 U.S.C. 2765a)

SEC. 1107. COORDINATION AND DISSEMINATION.

(a) GRANTS TO REGIONAL LABORATORIES.—From an amount equal to 65 percent of the amount reserved under section 1102(a)(2), the Secretary shall make grants to regional laboratories supported by the Secretary under section 405(d)(4)(A)(i) of the General Education Provisions Act for the purposes of—

(1) identifying model programs for dropout prevention and reentry in their regions;

(2) disseminating such programs; and

(3) providing assistance to schools in replicating such programs.

(b) ACTIVITIES OF THE NATIONAL DIFFUSION NETWORK.—The Secretary shall provide an amount equal to 45 percent of the amount reserved under section 1102(a)(2) to the National Diffusion Network established under section 1562 for the purpose of replicating model programs for dropout prevention and reentry.

(20 U.S.C. 2765b)

SEC. 1108. FISCAL REQUIREMENTS AND COORDINATION PROVISIONS.

(a) GENERAL RULE.—(1) The provisions of subsections (a) through (d) of section 1018 of this Act shall apply to the program authorized by this part.

(2) ADMINISTRATIVE COSTS.—Not more than 5 percent of a grant may be used for local administrative costs.

(3) COORDINATION AND DISSEMINATION.—Local educational agencies and community-based organizations receiving grants under this part shall cooperate with the coordination and dissemination efforts of the National Diffusion Network and State educational agencies.

(b) SPECIAL RULE.—(1) Each local educational agency shall use funds under this part to supplement the level of funds under this chapter that are used for secondary school programs.

(2) In order to comply with paragraph (1), any local educational agency which operates secondary school programs funded under chapter 1 of the Education Consolidation and Improvement Act of 1981 or part A of this Act and which is operating secondary school basic skills programs under this part shall continue the same aggregate level of funding for such programs, at the same schools or at other eligible schools within the local educational agency.

(20 U.S.C. 2766)

SEC. 1109. EVALUATION.

The provisions of sections 1019 and 1021 shall apply to local educational agencies receiving grants under this part.

(20 U.S.C. 2767)

SEC. 1110. DEFINITION OF SECONDARY SCHOOL COMPLETION RATE.

The Secretary shall establish a definition for the term "secondary school completion rate" for purposes of this part.

(20 U.S.C. 2767a)

SEC. 1111. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated $400,000,000 for the fiscal year 1990, $450,000,000 for the fiscal year 1991, $500,000,000 for the fiscal year 1992, and $550,000,000 for the fiscal year 1993 to carry out this part.

(20 U.S.C. 2768)

PART D—PROGRAMS OPERATED BY STATE AGENCIES

Subpart 1—Programs for Migratory Children

SEC. 1201. GRANTS—ENTITLEMENT AND AMOUNT.

(a) ENTITLEMENT.—A State educational agency or a combination of such agencies shall, upon application, be entitled to receive a grant for any fiscal year under this part to establish or improve, either directly or through local educational agencies, programs of education for migratory children of migratory agricultural workers (including migratory agricultural dairy workers) or of migratory fishermen which meet the requirements of section 1202.

(b) AMOUNT OF GRANT.—(1) Except as provided in section 1291, the total grants which shall be made available for use in any State (other than the Commonwealth of Puerto Rico) for this subpart shall be an amount equal to 40 percent of the average per pupil expenditure in the State (or (A) in the case where the average per pupil expenditure in the State is less than 80 percent of the average per pupil expenditure in the United States, of 80 percent of the average per pupil expenditure in the United States, or (B) in the case where the average per pupil expenditure in the State is more than 120 percent of the average per pupil expenditure in the United States, of 120 percent of the average per pupil expenditure in the United States) multiplied by (i) the estimated number of such migratory children aged 3 to 21, inclusive, who reside in the State full time, and (ii) the full-time equivalent of the estimated number of such migratory children aged 3 to 21, inclusive, who reside in the State part time, as determined by the Secretary in accordance with regulations, except that if, in the case of any State, such amount exceeds the amount required under section 1202, the Secretary shall allocate such excess, to the extent necessary, to other States, whose total of grants under this sentence would otherwise be insufficient for all such children to be served in such other States. In determining the full-time equivalent number of migratory children who are in a State during the summer months, the Secretary shall adjust the number so determined to take into account the special needs of those children for summer programs and the additional costs of operating such programs during the summer. In determining the number of migrant children for the purposes of this section the Secretary shall use statistics made available by the migrant student record transfer system or such other system as the Secretary may determine most accurately and fully reflects the actual number of migrant students. In submitting the information required to make such determination, the States may not exceed a standard error rate of 5 percent.

(2) To carry out the determinations of eligibility required by this section, the Secretary shall develop a national standard form for certification of migrant students.

(3) For each fiscal year, the Secretary shall determine the percentage which the average per pupil expenditure in the Commonwealth of Puerto Rico is of the lowest average per pupil expenditure of any of the 50 States. The grant which the Commonwealth of Puerto Rico shall be eligible to receive under this section for a fiscal year shall be the amount arrived at by multiplying the number of such migrant children in the Commonwealth of Puerto Rico by the product of—

(A) the percentage determined under the preceding sentence, and

(B) 32 percent of the average per pupil expenditure in the United States.

(20 U.S.C. 2781)

SEC. 1202. PROGRAM REQUIREMENTS.

(a) Requirements for Approval of Application.—The Secretary may approve an application submitted under section 1201(a) only upon a determination—

(1) that payments will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) which are designed to meet the special educational needs of migratory children of migratory agricultural workers (including migratory agricultural dairy workers) or of migratory fishermen, and to coordinate such programs and projects with similar programs and projects in other States, including the transmittal of pertinent information with respect to school records of such children;

(2) that in planning and carrying out programs and projects there has been and will be appropriate coordination with programs administered under section 418 of the Higher Education Act, section 402 of the Job Training Partnership Act, the Individuals with Disabilites Education Act, the Community Services Block Grant Act, the Head Start program, the migrant health program, and all other appropriate programs under the Departments of Education, Labor, and Agriculture;

(3) that such programs and projects will be administered and carried out in a manner consistent with the basic objectives of section 1011 (other than subsection (b)), sections 1012, 1014, and 1018, and subpart 2 of part F;

(4) that, in the planning and operation of programs and projects at both the State and local educational agency level, there is appropriate consultation with parent advisory councils (established in order to comply with this provision) for programs extending for the duration of a school year, and that all programs are carried out in a manner consistent with the requirements of section 1016;

(5) that, in planning and carrying out programs and projects, there has been adequate assurance that provision will be made for the preschool education needs of migratory children of mi-

gratory agricultural workers (including migratory agricultural dairy workers) or of migratory fishermen; and

(6) that programs conducted under this subpart will be evaluated in terms of their effectiveness in achieving stated goals, including objective measurements of educational achievement in basic skills, and that for formerly migratory children who have been served under this subpart in a full school year program for at least 2 years, such evaluations shall include a determination of whether improved performance is sustained for more than 1 year.

(b) CONTINUATION OF MIGRANT STATUS.—For purposes of this subpart, with the concurrence of the parents, a migratory child of a migratory agricultural worker (including migratory agricultural dairy workers) or of a migratory fisherman shall be considered to continue to be such a child for a period, not in excess of 5 years. Such children who are currently migrant, as determined pursuant to regulations of the Secretary, shall be given priority in the consideration of programs and activities contained in applications submitted under this section.

(c) DEFINITIONS.—The Secretary shall continue to use the definitions of "agricultural activity", "currently migratory child", and "fishing activity" which were published in the Federal Register on April 30, 1985, in regulations prescribed under section 555(b) of the Education Consolidation and Improvement Act of 1981 and subpart 1 of part B of title I of the Elementary and Secondary Education Act of 1965 (as in effect on April 30, 1985). No additional definition of "migratory agricultural worker" or "migratory fisherman" may be applied to the provisions of this subpart.

(d) BYPASS PROVISION.—If the Secretary determines that a State is unable or unwilling to conduct educational programs for migratory children of migratory agricultural workers (including migratory agricultural dairy workers) or of migratory fishermen, that it would result in more efficient and economic administration, or that it would add substantially to the welfare or educational attainment of such children, the Secretary may make special arrangements with other public or nonprofit private agencies to carry out the purposes of this section in 1 or more States, and for this purpose the Secretary may use all or part of the total of grants available for any such State under this subpart.

(20 U.S.C. 2782)

SEC. 1203. COORDINATION OF MIGRANT EDUCATION ACTIVITIES.

(a) ACTIVITIES AUTHORIZED.—(1) The Secretary is authorized to make grants to, and enter into contracts with, State educational agencies (in consultation with and with the approval of the States) for activities to improve the interstate and intrastate coordination among State and local educational agencies of the educational programs available for migratory students. Each grant issued under this paragraph shall not exceed 3 years for its stated purpose.

(2)(A) The Secretary is also authorized to enter into contracts with State educational agencies to operate a system for the transfer among State and local educational agencies of migrant student records (including individualized education programs approved under the Individuals with Disabilites Education Act).

(B) Except as provided in subparagraph (C), for the purpose of ensuring continuity in the operation of such system, the Secretary shall, not later than July 1 of each year, continue to award such contract to the State educational agency receiving the award in the preceding year, unless a majority of the States notify the Secretary in writing that such agency has substantially failed to perform its responsibilities under the contract during that preceding year.

(C) Beginning on July 1, 1992, and every 4 years thereafter, the Secretary shall conduct a competition to award such contract.

(D) No activity under this section shall, for purposes of any Federal law, be treated as an information collection that is conducted or sponsored by a Federal agency.

(3) Grants or contracts shall also be made under this section to State educational agencies to develop and establish a national program of credit exchange and accrual for migrant students so that such students will be better able to meet graduation requirements and receive their high school diplomas. Such grants or contracts may not exceed 3 years.

(b) Availability of Funds.—The Secretary shall, from the funds appropriated for carrying out this subpart, reserve for purposes of this section for any fiscal year an amount, determined by the Secretary, which shall not be less than $6,000,000 nor more than 5 percent of the amount appropriated.

(20 U.S.C. 2783)

Subpart 2—Programs for Handicapped Children

SEC. 1221. AMOUNT AND ELIGIBILITY.

(a) Eligibility for Grant.—(1) A State educational agency shall be eligible to receive a grant under this subpart for any fiscal year for programs (as defined in sections 1222 and 1223) for handicapped children (as defined in paragraph (2)(B)).

(2) For the purpose of this subpart—

(A) "children" includes infants and toddlers described in part H of the Individuals with Disabilites Education Act, as appropriate, and

(B) "handicapped children" means children who by reason of their handicap require special education and related services, or in the case of infants and toddlers, require early intervention services and who are mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children or children with specific learning disabilities.

(b) State Educational Agency Application.—In order to receive a grant under this subpart, a State educational agency shall submit an application to the Secretary which provides assurances that—

(1) all handicapped children (other than handicapped infants and toddlers) in the State participating in programs and projects funded under this subpart receive a free appropriate

public education and such children and such children's parents are provided all the rights and procedural safeguards under part B of the Individuals with Disabilites Education Act and this subpart and that all handicapped infants and toddlers in the State participating under this subpart receive early intervention services and such infants and toddlers and their families are provided the rights and procedural safeguards under part H of such Act;

(2) programs and projects receiving assistance under this subpart are administered in a manner consistent with this subpart, subpart 2 of part F, part B of the Individuals with Disabilites Education Act, and as determined by the Secretary to be appropriate, part H of the Individuals with Disabilites Education Act, including the monitoring by such agency of compliance under paragraph (1);

(3) programs and projects under this subpart will be coordinated with services under the Individuals with Disabilites Education Act;

(4) for fiscal year 1991, and each subsequent fiscal year, the State educational agency will administer the program authorized by this subpart through the State office responsible for administering part B of the Individuals with Disabilites Education Act;

(5) the agency will report annually to the Secretary—

(A) the number of children served under this subpart for each disability and age category as described in part B of the Individuals with Disabilites Education Act;

(B) the number of children served under this subpart in each of the educational placements described in section 618(b)(2) of the Individuals with Disabilites Education Act (and will report separately State-operated and State-supported programs and local educational agency programs for children previously served in such State programs); and

(C) on the uses of funds and the allocation of such funds for such uses under this subpart; and

(6) the agency will report to the Secretary such other information as the Secretary may reasonably request.

(c) AMOUNT OF GRANT.—(1) Except as provided in subsection (e) and section 1291, the grant which a State educational agency (other than the agency for Puerto Rico) shall be eligible to receive under this section shall be an amount equal to 40 percent of the average per pupil expenditure in the State (or (A) in the case where the average per pupil expenditure in the State is less than 80 percent of the average per pupil expenditure in the United States, of 80 percent of the average per pupil expenditure in the United States, or (B) in the case where the average per pupil expenditure in the State is more than 120 percent of the average per pupil expenditure in the United States, of 120 percent of the average per pupil expenditure in the United States), multiplied by the number of handicapped children, from birth through 21, enrolled on December 1, as determined by the Secretary, in programs or schools for handicapped infants, toddlers and children operated or supported by a State agency which—

(i) is directly responsible for providing free public education for handicapped children (including schools or programs providing special education and related services for handicapped children under contract or other arrangement with such agency); or

(ii) is directly responsible for providing early intervention services for handicapped infants or toddlers (including schools or programs providing special education and related services for handicapped children under contract or other arrangement with such agency),

in the most recent fiscal year for which satisfactory data are available. The State educational agency shall distribute such funds to the appropriate State agency on the basis of the December 1 child count by distributing an equal amount for each child counted.

(2) For each fiscal year, the Secretary shall determine the percentage which the average per pupil expenditure in the Commonwealth of Puerto Rico is of the lowest average per pupil expenditure of any of the 50 States. Except as provided in subsection (e), a grant which the Commonwealth of Puerto Rico shall be eligible to receive under this subpart for a fiscal year shall be the amount arrived at by multiplying the number of such handicapped children in the Commonwealth of Puerto Rico by the product of—

(A) the percentage determined under the preceding sentence, and

(B) 32 percent of the average per pupil expenditure in the United States.

(d) Counting of Children Transferring From State to Local Programs.—In any case in which a child described in sections 1225(1)(A) and 1225(1)(B)(i) leaves an educational program for handicapped children operated or supported by a State agency in order to participate in such a program operated or supported by a local educational agency, such child shall be counted under subsection (c) if—

(1) the child was receiving and continues to receive a free appropriate public education; and

(2) the State educational agency transfers to the local educational agency in whose program such child participates an amount equal to the sums received by such State educational agency under this section which are attributable to such child, to be used for the purpose set forth in section 1223.

(e) Special Requirement.—The State educational agency may count handicapped children aged 3 to 5, inclusive, in a State only if such State is eligible for a grant under section 619 of the Individuals with Disabilites Education Act.

(20 U.S.C. 2791)

SEC. 1222. PROGRAM REQUIREMENTS.

(a) General Requirements.—A State educational agency shall use the payments made under this subpart for programs and projects (including the acquisition of equipment) which are designed to supplement the special education needs of handicapped children (other than handicapped infants and toddlers) or the early intervention needs of handicapped infants and toddlers. Such programs and projects shall be administered in a manner consistent with this subpart, subpart 2 of part F, part B of the Individuals with Disabilites Education Act, and, as determined by the Secretary to be appropriate, part H of the Individuals with Disabilites Education Act.

(b) SERVICES.—Funds under this subpart shall be used to supplement the provision of special education and related services for handicapped children (other than handicapped infants and toddlers) or early intervention services for handicapped infants and toddlers.

(c) DEMONSTRATION OF BENEFIT.—Recipients of funds under this subpart shall collect and maintain such evaluations and assessments as may be necessary to demonstrate that the programs and projects were beneficial to the children served.

(20 U.S.C. 2792)

SEC. 1223. USES OF FUNDS.

(a) GENERAL RULE.—Programs, and projects authorized under this subpart may include, but are not limited to—

(1) services provided in early intervention, preschool, elementary, secondary, and transition programs;

(2) acquisition of equipment and instructional materials;

(3) employment of special personnel;

(4) training and employment of education aides;

(5) training in the use and provision of assistive devices and other specialized equipment;

(6) training of teachers and other personnel;

(7) training of parents of handicapped children;

(8) training of nonhandicapped children to facilitate their participation with handicapped children in joint activities;

(9) training of employers and independent living personnel involved in assisting the transition of handicapped children from school to the world of work and independent living;

(10) outreach activities to identify and involve handicapped children and their families more fully in a wide range of educational and recreational activities in their communities; and

(11) planning for, evaluation of, and dissemination of information regarding such programs and projects assisted under this subpart.

(b) PROHIBITION.—Programs and projects authorized under this subpart may not include the construction of facilities.

(20 U.S.C. 2793)

SEC. 1224. SERVICE AND PROGRAM APPLICATIONS.

(a) APPLICATION REQUIRED.—A State agency or local educational agency may receive a grant under this subpart for any fiscal year if it has on file with the State educational agency an application which describes the services, programs, and projects to be conducted with such assistance for a period of not more than 3 years, and each such application has been approved by the State educational agency. Any State educational agency operating programs or projects under this subpart shall prepare a written description of such programs and projects in accordance with subsections (b and (c).

(b) Requirements.—At a minimum each such application shall—

(1) indicate the number of children to be served;

(2) specify the number of children to be served for each disability and age category as described in part B of the Individuals with Disabilites Education Act;

(3) describe the purpose or purposes of the project and the method or methods of evaluating the effectiveness of the services, projects, or program;

(4) specify the services to be provided with the funds furnished under this subpart; and

(5) include other information the Secretary or State educational agency may request.

(c) Application Assurances.—Any such application shall provide assurances that—

(1) all handicapped children in the State (other than handicapped infants and toddlers) participating in programs and projects funded under this subpart receive a free appropriate public education and such children and such children's parents are provided all the rights and procedural safeguards under part B of the Individuals with Disabilites Education Act and this subpart and that all handicapped infants and toddlers in the State participating under this subpart receive early intervention services and such infants and toddlers and their families are provided the rights and procedural safeguards under part H of such Act;

(2) services, programs, and projects conducted under this subpart are of sufficient size, scope, and quality to give reasonable promise toward meeting the special educational and early intervention needs of children to be served;

(3) funds made available under the subpart will supplement, not supplant State and local funds in accordance with section 1018(b);

(4) the agency will maintain its fiscal effort in accordance with section 1018(a);

(5) the agency will conduct such evaluations and assessments as may be necessary to demonstrate that the programs and projects are beneficial to the children served;

(6) the parents of children to be served with funds under this subpart are provided an opportunity to participate in the development of its project application; and

(7) the agency will comply with all reporting requirements in a timely manner.

(d) Letter of Request.—The State educational agency may accept, in lieu of a project application, a letter of request for payment from a local educational agency, if the local agency intends to serve fewer than 5 children with its payment. In such a letter the agency shall include an assurance that the payment will be used to supplement the provision of special education and related services.

(20 U.S.C. 2794)

SEC. 1225. ELIGIBLE CHILDREN.

The children eligible for services under this subpart are—

(1) those handicapped children from birth to 21, inclusive, who—

(A) the State is directly responsible for providing special education or early intervention services to (including schools or programs providing special education and related services for handicapped children under contract or other arrangement with such agency), and

(B)(i) are participating in a State-operated or State-supported school or program for handicapped children (including schools and programs operated under contract or other arrangement with a State agency), or

(ii) previously participated in such a program and are receiving special education or early intervention services from local educational agencies; and

(2) other handicapped children, if children described in paragraph (1) have been fully served.

(20 U.S.C. 2795)

SEC. 1226. FEDERAL MONITORING REQUIREMENT.

Whenever the Secretary conducts monitoring visits under part B of the Individuals with Disabilites Education Act, the Secretary shall monitor the program authorized by this subpart, if applicable.

(20 U.S.C. 2796)

Subpart 3—Programs for Neglected and Delinquent Children

SEC. 1241. AMOUNT AND ENTITLEMENT.

(a) ENTITLEMENT TO GRANTS.—A State agency which is responsible for providing free public education for children in institutions for neglected or delinquent children or in adult correctional institutions shall be entitled to receive a grant under this subpart for any fiscal year (but only if grants received under this subpart are used only for children in such institutions).

(b) AMOUNT OF GRANT.—(1) Except as provided in section 1291, the grant which such an agency (other than the agency for Puerto Rico) shall be eligible to receive shall be an amount equal to 40 percent of the average per pupil expenditure in the State (or (A) in the case where the average per pupil expenditure in the State is less than 80 percent of the average per pupil expenditure in the United States, of 80 percent of the average per pupil expenditure in the United States, or (B) in the case where the average per pupil expenditure in the State is more than 120 percent of the average per pupil expenditure in the United States, of 120 percent of the average per pupil expenditure in the United States) multiplied by the number of such neglected or delinquent children in average daily attendance, as determined by the Secretary, at schools for such children operated or supported by that agency, including schools providing education for such children under contract or other arrangement with such agency, in the most recent fiscal year for which satisfactory data are available.

(2) For each fiscal year, the Secretary shall determine the percentage which the average per pupil expenditure in the Commonwealth of Puerto Rico is of the lowest average per pupil expenditure of any of the 50 States. The grant which the Commonwealth of Puerto Rico shall be eligible to receive under this subpart for a fiscal year shall be the amount arrived at by multiplying the number of such neglected or delinquent children in the Commonwealth of Puerto Rico by the product of—

(A) the percentage determined under the preceding sentence, and

(B) 32 percent of the average per pupil expenditure in the United States.

(20 U.S.C. 2801)

SEC. 1242. PROGRAM REQUIREMENTS.

(a) Use of Payments.—A State agency shall use payments under this subpart only for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of children in institutions for neglected or delinquent children, children attending community day programs for neglected and delinquent children, or children in adult correctional institutions. Such programs and projects shall be designed to support educational services supplemental to the basic education of such children which must be provided by the State, and such programs and projects shall be administered and carried out in a manner consistent with subpart 2 of part F and sections 1011(a), 1014, and section 1018 (other than subsection (c)). The transfer of neglected and delinquent student records among State and local educational agencies, institutions, and programs shall include any individualized education programs of such students.

(b) Compliance.—In determining whether programs under this subpart have complied with the supplement not supplant requirement under section 1018(b), programs which are supplementary in terms of the number of hours of instruction students are receiving from State and local sources shall be considered in compliance without regard to the subject areas in which those instructional hours are given.

(c) Three-Year Projects.—Where a State agency operates programs under this subpart in which children are likely to participate for more than 1 year, the State educational agency may approve the application for a grant under this subpart for a period of more than 1 year, but not to exceed 3 years.

(d) Evaluation.—Programs for neglected and delinquent children under this subpart shall be evaluated annually to determine their impact on the ability of such children to maintain and improve educational achievement, to maintain school credit in compliance with State requirements, and to make the transition to a regular program or special education program operated by a local educational agency.

(20 U.S.C. 2802)

SEC. 1243. TRANSITION SERVICES.

(a) TRANSITION SERVICES.—Each State may reserve not more than 10 percent of the amount it receives under section 1241 for any fiscal year to support projects that facilitate the transition of children from State operated institutions for neglected and delinquent children into locally operated programs.

(b) CONDUCT OF PROJECTS.—Projects supported under this section may be conducted directly by the State agency, or by contracts or other arrangements with one or more local educational agencies, other public agencies, or private nonprofit organizations.

(c) LIMITATION.—Assistance under this section shall be used only to provide special educational services to neglected and delinquent children in schools other than State operated institutions.

(20 U.S.C. 2803)

SEC. 1244. DEFINITIONS.

For the purposes of this subpart, the following terms have the following meanings:

(1) The term "institution for delinquent children", as determined by the State educational agency, means a public or private residential facility that is operated for the care of children who have been determined to be delinquent or in need of supervision.

(2) The term "institution for neglected children" means, as determined by the State educational agency, a public or private residential facility (other than a foster home) that is operated for the care of children who have been committed to the institution or voluntarily placed in the institution under applicable State law, due to abandonment, neglect, or death of parents or guardians.

(20 U.S.C. 2804)

Subpart 4—General Provisions for State Operated Programs

SEC. 1291. RESERVATION OF FUNDS FOR TERRITORIES.

There is authorized to be appropriated for each fiscal year for purposes of each of subparts 1, 2, and 3 of this part, an amount equal to not more than 1 percent of the amount appropriated for such year for such subparts, for payments to Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands under each such subpart. The amounts appropriated for each such subpart shall be allotted among Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands according to their respective need for such grants, based on such criteria as the Secretary determines will best carry out the purposes of this chapter.

(20 U.S.C. 2811)

SEC. 1292. DUAL ELIGIBILITY FOR PROGRAMS.

Neglected and delinquent children under subpart 3 who are eligible for programs for handicapped children under subpart 2, may be counted under each subpart for purposes of grant determination and may be served under each such program.

(20 U.S.C. 2812)

PART E—PAYMENTS

SEC. 1401. PAYMENT METHODS.

The Secretary shall, from time to time, pay to each State, in advance or otherwise, the amount which it and the local educational agencies of that State are eligible to receive under this chapter. Such payments shall take into account the extent (if any) to which any previous payment to such State educational agency under this chapter or chapter 1 of the Education Consolidation and Improvement Act of 1981 (whether or not in the same fiscal year) was greater or less than the amount which should have been paid to it.

(20 U.S.C. 2821)

SEC. 1402. AMOUNT OF PAYMENTS TO LOCAL EDUCATIONAL AGENCIES.

From the funds paid to it pursuant to section 1401 each State educational agency shall distribute to each local educational agency of the State which is eligible to receive a grant under this chapter and which has submitted an application approved pursuant to section 1012 the amount for which such application has been approved, and the amount which the local educational agency is eligible to receive under sections 1053 and 1102 except that the amount shall not exceed the amount determined for that local educational agency under this chapter.

(20 U.S.C. 2822)

SEC. 1403. ADJUSTMENTS WHERE NECESSITATED BY APPROPRIATIONS.

(a) Adjustment Allocation.—If the sums appropriated for any fiscal year for making the payments provided for in this chapter are not sufficient to pay in full the total amounts which all local and State educational agencies are entitled to receive under this chapter for such year, the amount available for each grant to a State agency eligible for a grant under subpart 1, 2, or 3 of part D shall be equal to the total amount of the grant as computed under each such subpart. If the remainder of such sums available after the application of the preceding sentence is not sufficient to pay in full the total amounts which all local educational agencies are entitled to receive under subpart 1 of part A of this chapter for such year, the allocations to such agencies shall, subject to section 1006(c) and to adjustments under the next sentence, be ratably reduced to the extent necessary to bring the aggregate of such allocations within the limits of the amount so appropriated. The allocation of a local educational agency which would be reduced under the preceding sentence to less than 85 percent of its allocation under subpart 1 of the part A for the preceding fiscal year, shall be increased to such amount, the total of the increases thereby required being derived by proportionately reducing the allocations of the remaining local educational agencies, under the preceding sentence, but with such adjustments as may be necessary to prevent the allocation to any remaining local educational agency from being thereby reduced to less than 85 percent of its allocation for such year.

(b) ADDITIONAL FUNDS ALLOCATION.—(1) If additional funds become available for making payments under this chapter for that year, allocations that were reduced pursuant to subsection (a) shall be increased on the same basis as they were reduced.

(2) In order to permit the most effective use of all appropriations made to carry out this chapter, the Secretary may set dates by which (A) State educational agencies must certify to the Secretary the amounts for which the applications of educational agencies have been or will be approved by the State, and (B) State educational agencies referred to in subpart 1 of part D must file applications. If the maximum grant a local educational agency would receive (after any ratable reduction which may have been required under the first sentence of subsection (a) of this section) is more than an amount which the State educational agency determines, in accordance with regulations prescribed by the Secretary, such agency will use, the excess amount shall be made available first to educational agencies in that State. Determinations of the educational agencies to which such excess amounts shall be made available by the State educational agency in furtherance of the purposes of this chapter shall be in accordance with criteria prescribed by the Secretary which are designed to assure that such excess amounts will be made available to other eligible educational agencies with the greatest need, for the purpose of, where appropriate, redressing inequities inherent in, or mitigating hardships caused by, the application of the provisions of section 1005(a) as a result of such factors as population shifts and changing economic circumstances. In the event excess amounts remain after carrying out the preceding 2 sentences of this section, such excess amounts shall be distributed among the other States as the Secretary shall prescribe for use by local educational agencies in such States for the purposes of this chapter in such manner as the respective State educational agencies shall prescribe.

(20 U.S.C. 2823)

SEC. 1404. PAYMENTS FOR STATE ADMINISTRATION.

(a) IN GENERAL.—The Secretary is authorized to pay to each State amounts equal to the amounts expended by it for the proper and efficient performance of its duties under this chapter (other than section 1021), except that the total of such payments in any fiscal year shall be the greater of the following:

(1) 1 percent of the amount allocated to the State and its local educational agencies and to other State agencies as determined for that year under parts A and D; or

(2) $325,000, or $50,000 in the case of Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(b) LIMITATION ON INDIRECT COSTS.—Not more than 15 percent of the State administrative allocation under subsection (a) may be used for indirect costs of the grant.

(20 U.S.C. 2824)

SEC. 1405. FUNDS FOR THE IMPLEMENTATION OF SCHOOL IMPROVEMENT PROGRAMS.

(a) GENERAL AUTHORITY.—The Secretary is authorized to pay, for the purpose of carrying out program improvement plans described in section 1021, to each State an amount equal to—

(1)(A) 0.25 percent of the amount allocated to the State and its local educational agencies as determined under parts A and D for fiscal years 1989, 1990, and 1991; and

(B) 0.5 percent of the amount allocated to the State and its local educational agencies as determined under parts A and D for fiscal years 1992 and 1993; or

(2)(A) $90,000 or $15,000 in the case of Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands for fiscal years 1989, 1990, and 1991; and

(B) $180,000 or $30,000 in the case of Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands for fiscal years 1992 and 1993.

(b) LIMITATIONS.—(1) No funds made available to States under subsection (a) may be used for administrative functions related to any provisions of this chapter.

(2) Funds made available to States under this section shall only be used for direct educational services in schools implementing program improvement plans as described under section 1021.

(3) Parents of participating children, school staff, the local educational agency and the State educational agency shall jointly agree to the selection of providers of technical assistance and the best use of funds available under subsection (a) for the effective implementation of the program improvement plan. Uses of such funds include assistance from—

(A) an institution of higher education;

(B) federally supported educational laboratory or center;

(C) State personnel with expertise in educational improvement;

(D) locally, State, or nationally based consultants; and

(E) other possible providers of the specific services required by the school's program plan.

(20 U.S.C. 2825)

SEC. 1406. LIMITATION ON GRANT TO THE COMMONWEALTH OF PUERTO RICO.

Notwithstanding the provisions of this chapter, the amount paid to the Commonwealth of Puerto Rico under this chapter for any fiscal year shall not exceed 150 percent of the amount received by the Commonwealth of Puerto Rico under chapter 1 of the Education Consolidation and Improvement Act or under this chapter in the preceding fiscal year. Any excess over such amount shall be used to ratably increase the allocations under subpart 1 of part A of the other local educational agencies whose allocations do not exceed the maximum amount for which the agencies are eligible under section 1005.

(20 U.S.C. 2826)

PART F—GENERAL PROVISIONS

Subpart 1—Federal Administration

SEC. 1431. FEDERAL REGULATIONS.

(a) IN GENERAL.—The Secretary is authorized to issue such regulations as are considered necessary to reasonably ensure that there is compliance with the specific requirements and assurances required by this chapter.

(b) PROCEDURE.—(1) Prior to publishing proposed regulations pursuant to this chapter, the Secretary shall convene regional meetings which shall provide input to the Secretary on the content of proposed regulations. Such meetings shall include representatives of Federal, State, and local administrators, parents, teachers, and members of local boards of education involved with implementation of programs under this chapter.

(2) Subsequent to regional meetings and prior to publishing proposed regulations in the Federal Register, the Secretary shall prepare draft regulations and submit regulations on a minimum of 4 key issues to a modified negotiated rulemaking process as a demonstration of such process. The modified process shall waive application of the Federal Advisory Committee Act, but shall otherwise follow the guidance provided in the Administrative Conference of the United States in Recommendation 82-4, "Procedures for Negotiating Proposed Regulations" (47 Fed. Reg. 30708, June 18, 1982) and any successor regulation. Participants in the demonstration shall be chosen by the Secretary from among participants in the regional meetings, representing the groups described in paragraph (1) and all geographic regions. The demonstration shall be conducted in a timely manner in order that final regulations may be issued by the Secretary within the 240-day period required by section 431(g) of the General Education Provisions Act.

(3) In an emergency situation in which regulations pursuant to this chapter must be issued within a very limited time to assist State and local educational agencies with the operation of the program, the Secretary may issue a regulation without such prior consultation, but shall immediately thereafter convene regional meetings to review the emergency regulation prior to issuance in final form.

(c) SPECIAL RULE.—Funds made available under sections 1437 and 1463 of this chapter shall be released for expenditure by the Secretary only at such time as final regulations pertaining to this chapter are published in the Federal Register.

(d) LIMITATION.—Programs under this chapter may not be required to follow any 1 instructional model, such as the provision of services outside the regular classroom or school program.

(20 U.S.C. 2831)

SEC. 1432. AVAILABILITY OF APPROPRIATIONS.

(a) GENERAL PROVISION.—Notwithstanding any other provision of law, unless expressly in limitation of this section, funds appropriated in any fiscal year to carry out activities under this chapter shall become available for obligation on July 1 of such fiscal year and shall remain available for obligation until the end of the subsequent fiscal year.

(b) CARRYOVER AND WAIVER.—Notwithstanding section 412 of the General Education Provisions Act, subsection (a) or any other provision of law—

(1) not more than 25 percent of funds appropriated for fiscal year 1989 and 15 percent of funds appropriated for fiscal year 1990 and each subsequent year may remain available for obligation for 1 additional year;

(2) a State educational agency may grant a 1-time waiver of the percentage limitation under paragraph (1) if the agency determines that the request by a local educational agency is reasonable and necessary or may grant a waiver in any fiscal year in which supplemental appropriations for this chapter become available for obligation; and

(3) the percentage limitation under paragraph (1) shall not apply with respect to any local educational agency which receives less than $50,000 under this chapter for any fiscal year.

(20 U.S.C. 2832)

SEC. 1433. WITHHOLDING OF PAYMENTS.

(a) WITHHOLDING.—Whenever the Secretary, after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this chapter, the Secretary shall notify such agency of these findings and that beginning 60 days after the date of such notification, further payments will not be made to the State under this chapter, or affected part or subpart thereof (or, in the Secretarys discretion, that the State educational agency shall reduce or terminate further payments under the affected part or subpart thereof, to specified local educational agencies or State agencies affected by the failure) until the Secretary is satisfied that there is no longer any such failure to comply. Until the Secretary is so satisfied, (1) no further payments shall be made to the State under the part or subpart thereof, or (2) payments by the State educational agency under the part or subpart thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

(b) NOTICE TO PUBLIC.—Upon submission to a State of a notice under subsection (a) that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring the withholding of payments to the attention of the public within the State.

(20 U.S.C. 2833)

SEC. 1434. JUDICIAL REVIEW.

(a) FILING APPEALS.—If any State is dissatisfied with the Secretary's action under section 1433(a), such State may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall act to suspend any withholding of funds by the Secretary pending the judgment of the court and prior to a final action on any review of such judgment. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of title 28, United States Code.

(b) Basis of Review.—For the purposes of this chapter, the basis of review shall be as provided in section 458(c) of the General Education Provisions Act.

(c) Judicial Appeals.—Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari of certification as provided in section 1254 of title 28, United States Code.

(20 U.S.C. 2834)

SEC. 1435. EVALUATION.

(a) National Standards.—In consultation with State and local educational agencies (including members of State and local boards of education and parent representatives), the Secretary shall develop national standards for local evaluation of programs under this chapter. In developing such standards, the Secretary may use the Title I Evaluation and Reporting System designed and implemented under title I of this Act, as in effect prior to the date of the enactment of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 as the model. The Secretary shall provide advance notification to State and local educational agencies of the requirements of such national standards of evaluations.

(b) Reports.—The Secretary shall submit a comprehensive and detailed report concerning State and local evaluation results based on data collected under sections 1019, 1107, 1202(a)(6), and 1242(d) to the appropriate committees of the Congress on a biennial basis.

(20 U.S.C. 2835)

SEC. 1436. COORDINATION OF FEDERAL, STATE, AND LOCAL ADMINISTRATION.

(a) Policy Manual.—The Secretary shall, not later than 6 months after the publication of final regulations with respect to this chapter, prepare and distribute to State educational agencies, State agencies operating programs under part D, and local educational agencies, and shall make available to parents and other interested individuals, organizations, and agencies, a policy manual for this chapter to—

(1) assist such agencies in (A) preparing applications for program funds under this chapter, (B) meeting the applicable program requirements under this chapter, and (C) enhancing the quality, increasing the depth, or broadening the scope of activities for programs under this chapter;

(2) assist State educational agencies in achieving proper and efficient administration of programs funded under this chapter;

(3) assist parents to become involved in the planning for, and implementation and evaluation of, programs and projects under this chapter; and

(4) ensure that officers and employees of the Department of Education, including officers and employees of the Secretary and officers and employees of such Department charged with auditing programs carried on under this chapter, uniformly interpret, apply, and enforce requirements under this chapter throughout the United States.

(b) Contents of Policy Manual.—The policy manual shall, with respect to programs carried out under this chapter, contain descriptions, statements, procedural and substantive rules, opinions, policy statements and interpretations and indices to and amendments of the foregoing, and in particular, whether or not such items are required under section 552 of title 5, United States Code to be published or made available. The manual shall include (but not be limited to)—

(1) a statement of the requirements applicable to the programs carried out under this chapter, including such requirements contained in this chapter, the General Education Provisions Act, other applicable statutes, and regulations issued under the authority of such statutes;

(2) an explanation of the purpose of each requirement and its interrelationship with other applicable requirements;

(3) a statement of the procedures to be followed by the Secretary with respect to proper and efficient performance of administrative responsibilities;

(4) summaries of (A) advisory opinions interpreting and applying applicable requirements, and (B) final audit determinations relevant to programs under this chapter, including examples of actual applications of the legal requirements of applicable statutes and regulations;

(5) model forms and instructions developed by the Secretary for use by State and local educational agencies, at their discretion, including, but not limited to, application forms, application review checklists, and instruments for monitoring programs under this chapter;

(6) summaries of appropriate court decisions concerning programs under this chapter; and

(7) model forms, policies, and procedures developed by State educational agencies.

(c) Response to Inquiries.—The Secretary shall respond with written guidance not more than 90 days after any written request (return receipt requested) from a State or local educational agency regarding a policy, question, or interpretation under this chapter. In the case of a request from a local educational agency, such agency must first have addressed its request to the State educational agency.

(d) Technical Assistance.—From funds available to the Secretary for studies, evaluations, and technical assistance, the Secretary shall continue, establish, and expand technical assistance centers to provide assistance to State and local educational agencies with respect to programs under this chapter. In providing such assistance, centers shall place particular emphasis on information relating to program improvement, parental involvement, instruction, testing and evaluation, and curriculum under this chapter. Such centers shall be accessible through electronic means.

(e) Federal Dissemination of Exemplary Programs.—To the extent possible, the Secretary shall provide information to State and local educational agencies regarding opportunities for dissemination of exemplary programs under this chapter through the National Diffusion Network. The Secretary shall emphasize programs which are exemplary in their implementation of the parent involvement provisions of section 1016. The Secretary shall coordinate Federal exemplary project identification activities with the National Diffusion Network.

(f) Federal Review of State and Local Administration.—The Secretary shall provide for a review of State and local administration of programs under this chapter. In addition to such other areas as the Secretary may consider appropriate, the review shall consider State policies, guidance materials, monitoring and enforcement activities, and the detection and resolution of problems of local noncompliance.

(20 U.S.C. 2836)

SEC. 1437. AUTHORIZATION OF APPROPRIATIONS FOR EVALUATION AND TECHNICAL ASSISTANCE.

There are authorized to be appropriated for the purposes of sections 1435 and 1436 for other Federal evaluation, technical assistance, and research activities related to this chapter, and authorized studies under this chapter, $4,000,000 for the fiscal year 1989, and such sums as may be necessary for each of the fiscal years 1990 through 1993.

(20 U.S.C. 2837)

SEC. 1438. APPLICATION OF GENERAL EDUCATION PROVISIONS ACT.

(a) General Rule.—Except as otherwise specifically provided by this section, the General Education Provisions Act shall apply to the programs authorized by this chapter.

(b) Supercession Rule.—The following provisions of the General Education Provisions Act shall be superseded by the specified provisions of this chapter with respect to the programs authorized by this subtitle:

(1) Section 408(a)(1) of the General Education Provisions Act is superseded by section 1431 of this chapter.

(2) Section 426(a) of such Act is superseded by section 1437 of this chapter.

(3) Section 427 of such Act is superseded by section 1016 of this chapter.

(4) Section 430 of such Act is superseded by sections 1012, 1056, 1104(b), 1125, 1202(a), and 1224 of this chapter.

(5) Section 455 of such Act is superseded by section 1433 of this chapter.

(6) Section 458 of such Act is superseded by section 1434 of this chapter with respect to judicial review of withholding of payments.

(c) EXCLUSION RULE.—Sections 434, 435, and 436 of the General Education Provisions Act, except to the extent that such sections relate to fiscal control and fund accounting procedures, shall not apply to the programs authorized by this chapter and shall not be construed to authorize the Secretary to require any reports or take any actions not specifically authorized by this chapter.

(20 U.S.C. 2838)

SEC. 1439. NATIONAL COMMISSION ON MIGRANT EDUCATION.

(a) ESTABLISHMENT.—There is established, as an independent agency within the executive branch, a National Commission on Migrant Education (referred to in this section as the "Commission").

(b) MEMBERSHIP.—

(1) The Commission shall be composed of 12 members. Four of the members shall be appointed by the President. Four of the members shall be appointed by the Speaker of the House, including 2 Members of the House, 1 from each political party. Four of the members shall be appointed by the President pro tempore of the Senate, including 2 Members of the Senate, 1 from each political party.

(2) The chairman shall be designated by the President from among the members appointed by the President. If the President has not appointed 4 members of the Commission and designated a chairman within 60 days of the enactment of this Act, the members of the Commission appointed by the Speaker of the House and the President pro tempore of the Senate shall elect a chairman who shall continue to serve for the duration of the Commission.

(3) Any vacancy in the Commission shall be filled in the same manner as the original appointment.

(c) STUDY.—The Commission shall make a study of the following issues:

(1) What are the demographics of the children of migratory workers today compared with 10 years ago and how are the demographics expected to change over the next decade.

(2) What are the individual roles of the Federal, State, and private sectors in migrant affairs; how has each sector enhanced migrant educational opportunities, including entry into all types of postsecondary education programs; and should Federal programs include incentives for private and State participation.

(3) What is the number of unserved or underserved migrant students who are eligible for the programs under this chapter nationwide and on a State-by-State basis.

(4) How can migrant education, migrant health, migrant Head Start, Job Training Partnership programs serving migrants, HEP/CAMP, and adult literacy programs be integrated and coordinated at both the Federal and State levels.

(5) How many migrant students are identified as potential drop-outs; how might this issue be addressed at the national policy level; and what effect does the migrant mother have on her children's performance.

(6) How do the migrant programs under this chapter vary from State to State; how do their administrative costs vary; how do parent involvement and services vary.

(7) What role has the Migrant Student Record Transfer System performed in assisting the migrant population; to what degree is it utilized for enhancing the education program at the local level and by the classroom teacher; is it cost effective; and how well would such a system adapt to other mobile populations like those in the inner cities or those in the Department of Defense overseas schools.

(8) How many prekindergarten programs are available to migratory children; what services are they provided; what is the degree of parent involvement with these programs; what is a typical profile of a student in such a program.

(9) How well are migrant handicapped and gifted and talented students identified and served; and what improvements might be made in this area.

(10) How many of the students being served are identified as "currently migrant" and how many are "formerly migrant"; what differences are there in their needs; and how do services provided differ between those of "currently migrant" and those of "formerly migrant".

(11) How does interstate and intrastate coordination occur at the State and local levels.

(12) Is there a need to establish a National Center for Migrant Affairs and what are the options for funding such a Center.

(d) REPORTS.—

(1) The Commission shall prepare and submit reports and recommendations to the President and to the appropriate committees of the Congress on the studies required to be conducted under this section. The reports for the studies required shall be submitted as soon as practicable.

(2) Any recommendations and reports submitted under this paragraph which contemplate changes in Federal legislation shall include draft legislation to accomplish the recommendations.

(e) SPECIAL STUDY ON THE MIGRANT STUDENT RECORDS TRANSFER SYSTEM.—(1) The Commission shall conduct a study of the function and the effectiveness of the Migrant Student Records Transfer System.

(2) The Commission shall prepare and submit to the Secretary of Education and to the Congress, not later than 2 years after the first meeting of the Commission, a report on the study required by paragraph (1).

(f) COMPENSATION.—

(1) Members of the Commission who are officers or full-time employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States; but they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(2) Members of the Commission who are not officers or full-time employees of the United States may each receive $150 per diem when engaged in the actual performance of duties vested in the Commission. In addition, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(f) [1] STAFF.—Such personnel as the Commission deems necessary may be appointed by the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and may be paid without regard to the provisions of chapter 51 and subtitle III of chapter 53 of such title relating to classification and General Schedule pay rates, but no individual so appointed shall be paid in excess of the rate authorized for GS-18 of the General Schedule.

(g) [1] ADMINISTRATION.—

(1) The Commission or, on the authorization of the Commission, any committee thereof, may, for the purpose of carrying out the provisions of this section, hold such hearings and sit and act at such times and such places within the United States as the Commission or such committee may deem advisable.

(2) In carrying out its duties under this section, the Commission shall consult with other Federal agencies, representatives of State and local governments, and private organizations to the extent feasible.

(3) The Commission is authorized to secure directly from any executive department, bureau, agency, board, commission, office, independent establishment, or instrumentality, information, suggestions, estimates, and statistics for the purpose of this section, and each such department, bureau, agency, board, commission, office, establishment, or instrumentality is authorized and directed, to the extent permitted by law, to furnish such information, suggestions, estimates, and statistics directly to the Commission, upon request made by the Chairman.

(4) For the purpose of securing the necessary data and information, the Commission may enter into contracts with universities, research institutions, foundations, and other competent public or private agencies. For such purpose, the Commission is authorized to obtain the services of experts and consultants in accordance with section 3109 of title 5, United States Code.

(5) The heads of all Federal agencies are, to the extent not prohibited by law, directed to cooperate with the Commission in carrying out this section.

(6) The Commission is authorized to utilize, with their consent, the services, personnel, information, and facilities of other Federal, State, local, and private agencies with or without reimbursement.

(7) The Commission shall have authority to accept in the name of the United States, grants, gifts, or bequests of money for immediate disbursement in furtherance of the functions of

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[1] So in original. Probably should be redesignated as "(g)".

[1] So in original. Probably should be redesignated as "(h)".

the Commission. Such grants, gifts, or bequests, after acceptance by the Commission, shall be paid by the donor or the donor's representative to the Treasurer of the United States whose receipts shall be their acquittance. The Treasurer of the United States shall enter them in a special account to the credit of the Commission for the purposes in each case specified.

(8) Six members of the Commission shall constitute a quorum, but a lesser number of 2 or more may conduct hearings.

(h)[2] TERMINATION.—The Commission shall terminate 3 years after the date of its first meeting.

(i)[1] AUTHORIZATION OF APPROPRIATIONS.—Effective October 1, 1988, there is authorized to be appropriated $2,000,000 to carry out the provisions of this section, which shall remain available until expended or until the termination of the Commission, whichever occurs first.

(20 U.S.C. 2839)

Subpart 2—State Administration

SEC. 1451. STATE REGULATIONS.

(a) IN GENERAL.—(1) Except as provided in paragraph (2), nothing in this chapter may be interpreted to preempt, prohibit, or encourage State regulations issued pursuant to State law which are not inconsistent with the provisions of this chapter, regulations promulgated under this chapter, or other applicable Federal statutes and regulations.

(2) State rules or policies may not limit local school districts' decisions regarding the grade levels to be served; the basic skills areas (such as reading, mathematics, or language arts) to be addressed; instructional settings, materials or teaching techniques to be used; instructional staff to be employed (as long as such staff meet State certification and licensing requirements for education personnel); or other essential support services (such as counseling and other pupil personnel services) to be provided as part of the programs authorized under this chapter.

(3) Nothing in this subsection may be construed to inhibit the State educational agency's responsibility to work jointly with local educational agencies and other State agencies receiving funds under this chapter in program improvement activities pursuant to section 1021 where the State may suggest various activities and approaches as it works with such agencies to develop program improvement plans.

(b) REVIEW BY COMMITTEE OF PRACTITIONERS.—Before publication of any proposed or final State rule or regulation pursuant to this chapter, each such rule shall be reviewed by a State committee of practitioners which shall include administrators, teachers, parents, and members of local boards of education, and on which a majority of the members shall be local educational agency representatives. In an emergency situation where such regulation must be issued within a very limited time to assist local educational agencies with the operation of the program, the State educational agency may issue a regulation without such prior consultation, but shall immediately thereafter convene a State committee of practitioners to review the emergency regulation prior to issuance in final form.

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[2] So in original. Probably should be redesignated as "(i)".

[1] So in original. Probably should be redesignated as "(j)".

(c) IDENTIFICATION AS STATE REQUIREMENT.—The imposition of any State rule or policy relating to the administration and operation of programs funded by this chapter (including those based on State interpretation of any Federal law, regulation, or guideline) shall be identified as a State imposed requirement.

(20 U.S.C. 2851)

SEC. 1452. RECORDS AND INFORMATION.

Each State educational agency shall keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation (consistent with the responsibilities of the Secretary under this chapter).

(20 U.S.C. 2852)

SEC. 1453. ASSIGNMENT OF PERSONNEL.

(a) LIMITATIONS.—Public school personnel paid entirely by funds made available under this chapter may be assigned limited supervisory duties which are assigned to similarly situated personnel who are not paid with such funds, and such duties need not be limited to classroom instruction or to the benefit of children participating in programs or projects funded under this chapter. The time spent by public school personnel on duties described in the preceding sentence may not exceed either—

(1) the same proportion of total work time as prevails with respect to similarly situated personnel at the same school site, or

(2) one period per day,

whichever is less.

(b) USE IN STATE PROGRAMS.—If a State carries out a program as defined under section 1018(d), the State may use funds under this chapter to pay salaries of personnel assigned to both the State program and the program under this chapter for administration, training, and technical assistance, if the State educational agency maintains time distribution records reflecting the actual amount of time spent by each such employee signed by that employee's supervisor, and costs are charged on a prorated basis to both programs.

(20 U.S.C. 2853)

SEC. 1454. PROHIBITION REGARDING STATE AID.

No State shall take into consideration payments under this chapter in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children.

(20 U.S.C. 2854)

Subpart 3—Rural Educational Opportunities

SEC. 1456. PROGRAM AUTHORIZED.

(a) GENERAL AUTHORITY.—The Secretary shall make grants to, or enter into contracts with, institutions of higher education, private nonprofit agencies and organizations, regional educational laboratories, technical assistance centers established pursuant to section 1436(d), public agencies, State education agencies, or combinations of such agencies or institutions within particular regions of the United States, to pay all or part of the cost of operating at least 10 rural assistance programs. The Secretary may not make a grant to, or enter into a contract with, any agency, institution, organization, or combination thereof under the preceding sentence unless such agency, institution, organization, or combination thereof has extensive experience providing educational assistance to State and local educational agencies.

(b) FUNCTIONS OF REGIONAL RURAL ASSISTANCE PROGRAMS.—Each regional rural assistance program established under subsection (a) shall provide technical assistance, consultation, training, and such other assistance as will assist State educational agencies and local educational agencies in the region to improve the quality of the education provided to educationally disadvantaged children participating in programs under this chapter who reside in rural areas or attend small schools. Each such program shall give special consideration to, and report on, problems related to districts with declining enrollments and ways in which districts can combine management to provide effective programs.

(20 U.S.C. 2861)

SEC. 1457. APPLICATION PRIORITY REQUIREMENTS.

(a) In carrying out this subpart, the Secretary shall give priority to applicants which describe assistance to school districts in local educational agencies in rural areas—

(1) with the highest concentrations of children from low-income families;

(2) that have a significant number or percentage of schools serving children from low-income families; and

(3) in which there are a significant number of schools in which evaluations indicate lack of substantial progress toward meeting desired outcomes, no improvement, or a decline in aggregate performance by the children participating in programs under this chapter.

(b) Applicants shall consult with State educational agencies and local educational agencies in the application process.

(20 U.S.C. 2862)

SEC. 1458. COORDINATION, DISSEMINATION, AND REPORT.

(a) COORDINATION.—Each program established under this subpart shall—

(1) coordinate its activities with technical assistance centers established under section 1436(d),

(2) coordinate its activities with the activities of local educational agencies and State educational agencies under section 1021, and

(3) assist in identifying successful programs and practices for dissemination through existing dissemination networks and efforts.

(b) DISSEMINATION AND REPORT.—(1) Each rural assistance program shall be accessible through electronic means.

(2) Regional rural assistance programs shall submit a report to the Secretary every 2 years containing such reasonable information about its activities as the Secretary may request, but including at a minimum information on efforts to provide effective services under this chapter in rural school districts facing declining enrollments, with particular attention to issues inherent in consolidating, jointly administering, or otherwise combining the resources of 2 or more districts.

(20 U.S.C. 2863)

SEC. 1459. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated $10,000,000 for fiscal year 1989 and such sums as may be necessary for each of the fiscal years 1990, 1991, 1992, and 1993.

(20 U.S.C. 2864)

Subpart 4—Studies

SEC. 1461. REPORT ON STATE AND LOCAL EVALUATIONS.

The Secretary shall submit a comprehensive and detailed report concerning State and local evaluation results based on data collected under sections 1019, 1107(a), 1202(a)(6), and 1242(d) to the appropriate committees of the Congress on a biennial basis.

(20 U.S.C. 2881)

SEC. 1462. NATIONAL STUDY ON EFFECT OF PROGRAMS ON CHILDREN.

(a) NATIONAL LONGITUDINAL STUDY.—The Secretary shall contract with a qualified organization or agency to conduct a national longitudinal study of eligible children participating in programs under this chapter. The study shall assess the impact of participation by such children in chapter 1 programs until they are 18 years of age. The study shall compare educational achievement of those children with significant participation in chapter 1 programs and comparable children who did not receive chapter 1 services. Such study shall consider the correlations between participation in programs under this chapter and academic achievement, delinquency rates, truancy, school dropout rates, employment and earnings, and enrollment in postsecondary education. The study shall be conducted throughout the country in urban, rural, and suburban areas and shall be of sufficient size and scope to assess and evaluate the effect of the program in all regions of the Nation.

(b) FOLLOW-UP.—The agency or organization with which the Secretary has entered a contract under subsection (a) shall conduct a follow-up of the initial survey which shall include a periodic update on the participation and achievement of a representative group of children who participated in the initial study. Such follow-up shall evaluate the effects of participation until such children are 25 years of age.

(c) REPORT.—A final report summarizing the findings of the study shall be submitted to the appropriate committees of the Congress not later than January 1, 1997; an interim report shall be so submitted not later than January 1, 1993.

(20 U.S.C. 2882)

SEC. 1463. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated $4,000,000 for the fiscal year 1989, $4,200,000 for the fiscal year 1990, $4,400,000 for the fiscal year 1991, $4,700,000 for the fiscal year 1992, and $5,000,000 for the fiscal year 1993 for carrying out sections 1461 and 1462.

(20 U.S.C. 2883)

Subpart 5—Definitions

SEC. 1471. DEFINITIONS.

Except as otherwise provided, for purposes of this Act:

(1) The term "average daily attendance" means attendance determined in accordance with State law, except that notwithstanding any other provision of this chapter, where the local educational agency of the school district in which any child resides makes or contracts to make a tuition payment for the free public education of such child in a school situated in another school district, for purposes of this chapter the attendance of such child at such school shall be held and considered (A) to be in attendance at a school of the local educational agency so making or contracting to make such tuition payment, and (B) not to be in attendance at a school of the local educational agency receiving such tuition payment or entitled to receive such payment under the contract.

(2) The term "average per pupil expenditure" means in the case of a State or the United States, the aggregate current expenditures, during the third fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available), of all local educational agencies in the State, or in the United States (which for the purposes of this subsection means the 50 States, and the District of Columbia), as the case may be, plus any direct current expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year.

(3) The term "community-based organization" means a private nonprofit organization which is representative of a community or significant segments of a community and which provides educational or related services to individuals in the community.

(4) The term "construction" includes the preparation of drawings and specifications for school facilities; erecting, building, acquiring, altering, remodeling, improving, or extending

school facilities; and the inspection and supervision of the construction of school facilities.

(5) The term "county" means those divisions of a State utilized by the Secretary of Commerce in compiling and reporting data regarding counties.

(6) The term "current expenditures" means expenditures for free public education, including expenditures for administration, instruction, attendance, and health services, pupil transportation services, operation and maintenance of plant, fixed charges, and net expenditures to cover deficits for food services and student body activities, but not including expenditures for community services, capital outlay, and debt service, or any expenditures made from funds granted under this chapter, chapter 2 of this title, or chapter 1 or 2 of the Education Consolidation and Improvement Act of 1981.

(7) The term "effective schools programs" means school-based programs that may encompass preschool through secondary school levels and that have the objective of (A) promoting school-level planning, instructional improvement, and staff development, (B) increasing the academic achievement levels of all children and, particularly, educationally deprived children, and (C) achieving as ongoing conditions in the school the following factors identified through effective school research as distinguishing effective from ineffective schools—

(i) strong and effective administrative and instructional leadership that creates consensus on instructional goals and organizational capacity for instructional problem solving;

(ii) emphasis on the acquisition of basic and higher order skills;

(iii) a safe and orderly school environment that allows teachers and pupils to focus their energies on academic achievement;

(iv) a climate of expectations that all children can learn under appropriate conditions; and

(v) continuous assessment of students and programs to evaluate the effects of instruction.

(8) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(9) The term "equipment" includes machinery, utilities, and building equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, and books, periodicals, documents, and other related materials.

(10) The term "institution of higher education" has the meaning given that term in section 1201(a) of the Higher Education Act of 1965.

(11) The term "free public education" means education which is provided at public expense, under public supervision

and direction, and without tuition charge, and which is provided as elementary or secondary school education in the applicable State, except that such term does not include any education provided beyond grade 12.

(12) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(13) The term "more advanced skills" means skills including reasoning, analysis, interpretation, problem-solving, and decisionmaking as they relate to the particular subjects in which instruction is provided under programs supported by this chapter.

(14) The term "parent" includes a legal guardian or other person standing in loco parentis.

(15) The term "parent advisory council" means a body composed primarily of members who are parents of children served by the programs or projects assisted under this chapter and who are elected by such parents, in order to advise the State or local educational agency in the planning, implementation, and evaluation of programs under this chapter.

(16) The term "project area" means a school attendance area having a high concentration of children from low-income families which, without regard to the locality of the project itself, is designated as an area from which children are to be selected to participate in a program or project assisted under this chapter.

(17) The terms "pupil services personnel" and "pupil services" mean school counselors, school social workers, school psychologists, and other qualified professional personnel involved in providing assessment, diagnosis, counseling, educational, therapeutic, and other necessary services as part of a comprehensive program to meet student needs, and the services provided by such individuals.

(18) The term "school attendance area" means in relation to a particular school, the geographical area in which the children who are normally served by that school reside.

(19) The term "school facilities" means classrooms and related facilities (including initial equipment) for free public education and interests in land (including site, grading, and improvements) on which such facilities are constructed, except that such term does not include those gymnasiums and similar facilities intended primarily for exhibitions for which admission is to be charged to the general public.

(20) The term "Secretary" means the United States Secretary of Education.

(21) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(22) The term "State" means a State, the Commonwealth of Puerto Rico, Guam, the District of Columbia, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(23) The term "State educational agency" means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools.

(20 U.S.C. 2891)

Subpart 6—Miscellaneous Provisions

SEC. 1491. TRANSITION PROVISIONS.

(a) REGULATIONS.—All orders, determinations, rules, regulations, permits, grants, and contracts, which have been issued by the Secretary under chapter 1 of the Education Consolidation and Improvement Act of 1981 and title I of this Act (as in effect on the date before the effective date of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988), or which are issued under such Acts on or before the effective date of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 shall continue in effect until modified or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law.

(b) EFFECT ON PENDING PROCEEDINGS.—The provisions of this chapter shall not affect administrative or judicial proceedings pending on the effective date of this section under chapter 1 of the Education Consolidation and Improvement Act of 1981 or this title.

(c) TRANSITION.—With respect to the period beginning on July 1, 1988, and ending June 30, 1989, no recipient of funds under this chapter, or chapter 2 of this title, or under chapter 1 or 2 of the Education Consolidation and Improvement Act of 1981 shall be held to have expended such funds in violation of the requirements of this Act or of such Act if such funds are expended either in accordance with this Act or such Act.

(20 U.S.C. 2901)

Appendix B

GENERAL EDUCATION PROVISIONS ACT

General Education Provisions Act[1]

SHORT TITLE; APPLICABILITY; DEFINITIONS; APPROPRIATIONS

SEC. 400. (a) This title may be cited as the "General Education Provisions Act."

(b) Except where otherwise specified, the provisions of this title shall apply to any program for which an administrative head of an education agency has administrative responsibility as provided by law or by delegation of authority pursuant to law.

(c)(1) For the purposes of this title, the term—

(A) "applicable program" means any program to which this title is, under the terms of subsection (b), applicable;

(B) "applicable statute" means—

(i) the Act or the title, part or section of an Act, as the case may be, which authorizes the appropriation for an applicable program;

(ii) this title; and

(iii) any other statute which under its terms expressly controls the administration of an applicable program;

(C)[2] "Assistant Secretary" means the Assistant Secretary of Health, Education, and Welfare for Education;

(D)[3] "Commissioner" means the Commissioner of Education;

(E) "Director" means the Director of the National Institute of Education; and

(F)[4] "Secretary" means the Secretary of Health, Education, and Welfare.

(2) Nothing in this title shall be construed to affect the applicability of the Civil Rights Act of 1964 to any program subject to the provisions of this title.

(3) No Act making appropriations to carry out an applicable program shall be considered an applicable statute.

(d) Except as otherwise limited in this title, there are authorized to be appropriated for any fiscal year such sums as may be necessary to carry out the provisions of this title.

(e)(1) The aggregate of the appropriations to the agencies in the Education Division and to the Office of Assistant Secretary for any fiscal year shall not exceed the limitations set forth for that fiscal year in subparagraph (2).

(2)(A) Except as is provided in subparagraph (B), the appropriations to which paragraph (1) applies—

(i) shall not exceed $7,500,000,000 for the fiscal year ending June 30, 1975, $8,000,000,000 for the fiscal year ending June 30,

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[1] The General Education Provision Act was enacted as title IV of Public Law 90-247.

The organizational changes made by the Department of Education Reorganization Act, P.L. 96-88, are also indicated in this text.

[2] The Office of Assistant Secretary of H.E.W. for Education was terminated by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec. 503, 93 Stat. 690. (Assistant secretary's functions transferred to Secretary of Education by sec. 301 of that Act).

[3] The Education Division of H.E.W. (including the office of Commissioner of Education) was terminated by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec. 503, 93 Stat. 690. (Commissioner's functions transferred to Secretary of Education by sec. 301 of that Act).

[4] All previous functions of the Secretary of H.E.W. provided for in the General Education Provisions Act and various other Education-related statutes were transferred to the Secretary of Education by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

1976, and $9,000,000,000 for the fiscal year ending June 30, 1977; and

(ii) shall not exceed such amounts as may be authorized by the law and limited by this subparagraph.

(B) The limitations set forth in subparagraph (A) shall not apply—

(i) to uncontrollable expenditures under obligations created under part B of title IV of the Higher Education Act of 1965, parts C and D of title VII of such Act, and the Emergency Insured Student Loan Act of 1969; and

(ii) to any other expenditure under an obligation determined by the Commissioner pursuant to, or in accordance with, law to be an uncontrollable expenditure of the Office of Education.

(20 U.S.C. 1221) Enacted Jan. 2, 1968, P.L. 90-247, sec. 401, 81 Stat. 814; amended Oct. 16, 1968, P.L. 90-576, sec. 301(a), 82 Stat. 1094; amended April 13, 1970, P.L. 91-230, sec. 401(a)(2), 84 Stat. 164; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 93-380, sec. 505(a)(1), 88 Stat. 561, 562; see also general reference Oct. 17, 1979, P.L. 96-88, secs. 301, 503, 93 Stat. 677-679, 690.

CONTROL OF PAPERWORK

Sec. 400A. (a)(1)(A) In order to eliminate excessive detail and unnecessary and redundant information requests and to achieve the collection of information in the most efficient and effective possible manner, the Secretary shall coordinate the collection of information and data acquisitioned activities of all Federal agencies, (i) whenever the respondents are primarily educational agencies or institutions, or (ii) whenever the purpose of such activities is to request information needed for the management of, or the formulation of, policy related to Federal education programs or research or evaluation studies related to the implementation of Federal education programs.

(B) There is hereby established a Federal Education Data Acquisition Council, to consist of members appointed by the Secretary who shall represent the public and the major agencies which collect and use education data, including one representative each of the Office of Management and Budget and of the Office of Federal Statistical Policy and Standards. The members representing the public may be appointed for not more than three years. The Council shall advise and assist the Secretary with respect to the improvement, development, and coordination of Federal education information and data acquisition activities, and shall review the policies, practices, and procedures established by the Secretary. The Council shall meet regularly during the year and shall be headed by an individual from an agency which has expertise in data collection but which undertakes no major data collection of education data.

(2) For the purposes of this section, the term—

(A) "information" has the meaning given it by section 3502 of title 44, United State Code;

(B) "Federal agency" has the meaning given it by section 3502 of the same title; and

(C) "educational agency or institution" means any public or private agency or institution offering education programs.

(3)(A) The Secretary shall review and coordinate all collection of information and data acquisition activities described in paragraph (1)(A) of this subsection, in accordance with procedures approved by the Federal Education Data Acquisition Council. Such procedures shall be designed in order to enable the Secretary to determine whether proposed collection of information and data acquisition activities are excessive in detail, unnecessary, redundant, ineffective, or excessively costly, and, if so, to advise the heads of the relevant Federal agencies.

(B) No collection of information or data acquisition activity subject to such procedures shall be subject to any other review, coordination, or approval procedure outside of the relevant Federal agency, except as required by this subsection and by the Director of the Office of Management and Budget under the rules and regulations established pursuant to chapter 35 of title 44, United States Code. If a requirement for information is submitted pursuant to this Act for review, the timetable for the Director's approval established in section 3507 of the Paperwork Reduction Act of 1980 shall commence on the date the request is submitted, and no independent submission to the Director shall be required under such Act.

(C) The procedures established by the Secretary shall include a review of plans for evaluations and for research when such plans are in their preliminary stages, in order to give advice to the heads of Federal agencies regarding the data acquisition aspects of such plans.

(b)(1) The Secretary shall assist each Federal agency in performing the review and coordination required by this section and shall require of each agency a plan for each collection of information and data acquisition activity, which shall include—

(A) a detailed justification of how information once collected will be used;

(B) the methods of analysis which will be applied to such data;

(C) the timetable for the dissemination of the collected data; and

(D) an estimate of the costs and man-hours required by each educational agency or institution to complete the request and an estimate of costs to Federal agencies to collect, process, and analyze the information, based upon previous experience with similar data or upon a sample of respondents.

(2) In performing the review and coordination required by this section, the Secretary shall assure that—

(A) no information or data will be requested of any educational agency or institution unless that request has been approved and publicly announced by the February 15 immediately preceding the beginning of the new school year, unless there is an urgent need for this information or a very unusual circumstance exists regarding it;

(B) sampling techniques, instead of universal responses, will be used wherever possible, with special consideration being given to the burden being placed upon small school districts, colleges, and other educational agencies and institutions; and

(C) no request for information or data will be approved if such information or data exist in the same or a similar form in the automated indexing system required to be developed pursuant to subsection (d).

(3) Each educational agency or institution subject to a request under the collection of information and data acquisition activity and their representative organizations shall have an opportunity during a thirty-day period, to comment to the Secretary on the collection of information and data acquisition activity. The exact data instruments for each proposed activity shall be available to the public upon request during this comment period.

(4) No changes may be made in the plans for the acquisition of that information or data, except changes required as a result of the review described in this section, after such plans have been finally approved under this section, unless the changed plans go through the same approval process.

(5) The Secretary may waive the requirements of this section for individual research and evaluation studies which are not designated for individual project monitoring or review, provided that—

(A) the study shall be of a nonrecurring nature;

(B) any educational agency or institution may choose whether or not to participate, and that any such decision shall not be used by any Federal agency for purposes of individual project monitoring or funding decisions;

(C) the man-hours necessary for educational agencies and institutions to respond to requests for information or data shall not be excessive, and the requests shall not be excessive in detail, unnecessary, redundant, ineffective, or excessively costly; and

(D) the Federal agency requesting information or data has announced the plans for the study in the Federal Register.

The Secretary shall inform the relevant agency or institution concerning the waiver decision within thirty days following such an announcement, or the study shall be deemed waived and may proceed. Any study waived under the provisions of this subsection shall be subject to no other review than that of the agency requesting information or data from educational agencies or institutions.

(6) Nothing in this section shall be construed to interfere with the enforcement of the provisions of the Civil Rights Act of 1964 or any other nondiscrimination provision of Federal law.

(c) The Secretary shall, insofar as practicable, and in accordance with the provisions of this Act, provide educational agencies and institutions and other Federal agencies, pursuant to the requirement of section 406(f)(2)(A), with summaries of information collected and the data acquired by Federal agencies, unless such data were acquired on a confidential basis.

(d) The Secretary shall, insofar as practicable—

(1) develop standard definitions and terms consistent, wherever possible, with those established by the Office of Federal Statistical Policy and Standards, Department of Commerce, to be used by all Federal agencies in dealing with education-related information and data acquisition requests;

(2) develop an automated indexing system for cataloging all available data;

(3) establish uniform reporting dates among Federal agencies for the information and data acquisition required after review under this section;

(4) publish annually a listing of education data requests, by Federal agency, and for the programs administered in the Education Division, publish a listing annually of each such program with its appropriation and with the data burden resulting from each such program; and

(5) require the Federal agency proposing the collection of information or data acquisition activity to identify in its data instrument the legislative authority specifically requiring such collection, if any, and require the responding educational agency or institution to make the same identification if it in turn collects such information or data from other agencies or individuals.

(e)(1) Subject to the provisions of paragraph (2), the Secretary shall develop, in consultation with Federal and State agencies and local educational agencies, procedures whereby educational agencies and institutions are permitted to submit information required under any Federal educational program to a single Federal or State educational agency.

(2) Any procedures developed under paragraph (1) shall be considered regulations for the purpose of section 431 and shall be submitted subject to disapproval in accordance with section 431(e) of this Act for a period of not to exceed 60 days computed in accordance with such section.

(3) The Secretary shall submit a report to the Congress not less than once every three years, describing the implementation of this section. Such report shall contain recommendations for revisions to Federal laws which the Secretary finds are imposing undue burdens on educational agencies and institutions, and such recommendations shall not be subject to any review by any Federal agency outside the Department.

(f)(1) The Secretary is authorized to make grants from sums appropriated pursuant to this subsection to State educational agencies, including State agencies responsible for postsecondary education, for the development or improvement of education management information systems.

(2) Any State educational agency is eligible for a grant of funds under this subsection subject to the following conditions:

(A) The agency agrees to use such funds for the development or improvement of its management information system and agrees to coordinate all data collection for Federal programs administered by the agency through such a system.

(B) The agency agrees to provide funds to local educational agencies and institutions of higher education for the development or improvement of management information systems when such grants are deemed necessary by the State educational agency.

(C) The State agency agrees to take specific steps, in cooperation with the Secretary and with local educational agencies or institutions of higher education in the State, as appropriate, to eliminate excessive detail and unnecessary and redundant information requests within the State and to achieve the collection of information in the most efficient and effective possible manner so as to avoid imposing undue burdens on local educational agencies or institutions of higher education.

(g) For the purpose of carrying out this subsection—

(1) there are authorized to be appropriated for salaries and expenses $600,000 for fiscal year 1979, $1,000,000 for fiscal year 1980, and $1,200,000 for each of the two succeeding fiscal years

(2) there are authorized to be appropriated for grants under subsections (f) (1) and (2) the sums of $5,000,000 for fiscal year 1979, $25,000,000 for fiscal year 1980, and $50,000,000 for each of the two succeeding fiscal years; and

(3) the sums appropriated according to paragraphs (1) and (2 shall be appropriated as separate line items.

(20 U.S.C. 1221-3) Enacted Nov. 1, 1978, P.L. 95-561, sec. 1212(b), 92 Stat. 2338-2341; amended Aug. 6, 1979, P.L. 96-46, sec. 4(a), 93 Stat. 342 (effective Oct. 1, 1978) amended by reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Dec 11, 1980, P.L. 96-511, sec. 4(a), 94 Stat. 2826.

PART A—EDUCATION DIVISION OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE[1]

THE EDUCATION DIVISION

SEC. 401. (a) There shall be, within the Department of Health Education, and Welfare, an Education Division, composed of the agencies listed in subsection (b), which shall be headed by the Assistant Secretary.

(b)(1) The Education Division shall be composed of the following agencies:

(A) The Office of Education; and

(B) The National Institute of Education.

(2) In the Office of the Assistant Secretary there shall be a National Center for Education Statistics.

Enacted June 23, 1972, P.L. 92-318, sec. 301(a)(2), 86 Stat. 327; amended August 21, 1974, P.L. 93-380, sec. 504(a), 88 Stat. 561.

ASSISTANT SECRETARY FOR EDUCATION[2]

SEC. 402. (a) There shall be in the Department of Health, Education, and Welfare an Assistant Secrêtary for Education, who shall be appointed by the President by and with the advice and consent of the Senate. The Assistant Secretary for Education shall be compensated at the rate specified for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(b) The Assistant Secretary shall be the principal officer in the Department to whom the Secretary shall assign responsibility for the direction and supervision of the Education Division.

Enacted June 23, 1972, P.L. 92-318, sec. 301(a)(2), 86 Stat. 327; amended August 21, 1974, P.L. 93-380, sec. 501(a)(2)(A), 88 Stat. 560.

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[1] The Education Division of the Department of Health, Education, and Welfare was terminated by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec 503, 93 Stat. 690. The previous functions of the Education Division were transferred to the Secretary of Education by sec. 301 of that Act (93 Stat. 677). Sections 401-403 of the General Education Provisions Act, in effect at the time of enactment of P.L. 96-88, are printed here for legislative history purposes.

[2] The Office of Assistant Secretary of Health, Education, and Welfare for Education was terminated by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec. 503, 93 Stat. 690. The previous functions of the Assistant Secretary for Education were transferred to the Secretary of Education by sec. 301 of that Act (93 Stat. 677).

THE OFFICE OF EDUCATION [1]

Sec. 403. (a) There shall be an Office of Education (hereinafter in this section referred to as the "Office") which shall be the primary agency of the Federal Government responsible for the administration of programs of financial assistance to educational agencies, institutions, and organizations. The Office shall have such responsibilities and authorities as may be vested in the Commissioner by law or delegated to the Commissioner in accordance with law.

(b) The Office shall be headed by the Commissioner of Education who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall be subject to the direction and supervision of the Secretary.

(c)(1) The Office shall, consistent with such organization thereof which is provided by law, be divided into bureaus, and such bureaus shall be divided into divisions as the Commissioner determines appropriate.

(2)(A) There shall be regional offices of the Office established in such places as the Commissioner, after consultation with the Assistant Secretary, shall determine. Such regional offices shall carry out such functions as are specified in subparagraph (B).

(B) The regional offices shall serve as centers for the dissemination of information about the activities of the agencies in the Education Division and provide technical assistance to State and local educational agencies, institutions of higher education, and other educational agencies, institutions, and organizations and to individuals and other groups having an interest in Federal education activities.

(C) The Commissioner shall not delegate to any employee in any regional office any function which was not carried out, in accordance with regulations effective prior to June 1, 1973, by employees in such offices unless the delegation of such function to employees in regional offices is expressly authorized by law enacted after the enactment of the Education Amendments of 1974 [2]

(d)(1) There shall be, in the Office of Education, an Office of Non-Public Education to insure the maximum potential participation of nonpublic school students in all Federal educational programs for which such children are eligible.

(2) The Office shall be headed by the Deputy Commissioner for Non-Public Education, who shall be appointed by the Commissioner.

(20 U.S.C. 1221c) Enacted June 23, 1972, P.L. 92-318, sec. 301(a)(2), 86 Stat. 327; amended August 21, 1974, P.L. 93-380, sec. 503(a), 88 Stat. 560, 561; amended October 12, 1976, P.L. 94-482, sec. 409(a), 90 Stat. 2233; amended Nov. 1, 1978, P.L. 95-561, sec. 1241, 92 Stat. 2351; amended Oct. 19, 1980, P.L. 96-470, sec. 106(d), 94 Stat. 2238.

FUND FOR THE IMPROVEMENT OF POSTSECONDARY EDUCATION

Sec. 404. [Repealed by section 1001(c) of the Education Amendments of 1980 (94 Stat. 1491). Section 1001(a) of such Amendments reenacted the Fund for the Improvement of Postsecondary Education as title X of the Higher Education Act of 1965.]

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[1] The Office of Education was terminated by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec. 503, 93 Stat. 690. The previous functions of the Office of Education were transferred to the Secretary of Education by sec. 301 of that Act (93 Stat. 677).

[2] Sec 503(b) of P.L. 93-380 provides that the provisions of limitation set forth in this subsection shall be retroactive to June 1, 1973.

OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT

SEC. 405. (a)(1) The Congress declares it to be the policy of the United States to provide to every individual an equal opportunity to receive an education of high quality regardless of his race, color, religion, sex, age, handicap, national origin, or social class. Although the American educational system has pursued this objective, it has not attained the objective. Inequalities of opportunity to receive high quality education remain pronounced. To achieve the goal of quality education requires the continued pursuit of knowledge about education through research, improvement activities, data collection, and information dissemination. While the direction of American education remains primarily the responsibility of State and local governments, the Federal Government has a clear responsibility to provide leadership in the conduct and support of scientific inquiry into the educational process.

(2) The Congress further declares it to be the policy of the United States to—

(A) promote the quality and equity of American education,[1]

(B) advance the practice of education as an art, science, and profession;

(C) support educational research of the highest quality;

(D) strengthen the educational research and development system;

(E) improve educational techniques and training;

(F) assess the national progress of this Nation's schools and educational institutions, particularly special populations; and;

(G) collect, analyze, and disseminate statistics and other data related to education in the United States and other nations.

(3) For purposes of this section—

(A) the term "Assistant Secretary" means the Assistant Secretary for Educational Research and Improvement established by section 202 of the Department of Education Organization Act;

(B) the term "Council" means the National Advisory Council on Educational Research and Improvement established by subsection (c);

(C) the term "educational research" includes basic and applied research, development, planning, surveys, assessments, evaluations, investigations, experiments, and demonstrations in the field of education and other fields relating to education;

(D) the term "Office" means the Office of Educational Research and Improvement established by section 209 of the Department of Education Organization Act; and

(E) the terms "United States" and "State" include the District of Columbia and the Commonwealth of Puerto Rico.

(b)(1) It shall be the purpose of the Office to carry out the policies set forth in subsection (a) of this section. The Office shall be administered by the Assistant Secretary and shall include—

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[1] So in original. The comma probably should be a semicolon.

(A) the National Advisory Council on Educational Research and Improvement established in subsection (c);

(B) the Center for Education Statistics established by section 406; and

(C) such other units as the Secretary deems appropriate to carry out the purposes of the Office.

(2) The Office shall, in accordance with the provisions of this section, seek to improve education in the United States through concentrating the resources of the Office on the priority research and development needs described in paragraph (3).

(3) The needs to which paragraph (2) apply are—

(A) improving student achievement;

(B) improving the ability of schools to meet their responsibilities to provide equal educational opportunities for all students, including those with limited English-speaking ability, women, older students, part-time students, minority students, gifted and talented students, handicapped students, and students who are socially, economically, or educationally disadvantaged;

(C) collecting, analyzing, and disseminating statistics and other data related to education in the United States and other nations;

(D) improving the dissemination and application of knowledge obtained through educational research and data gathering, particularly to education professionals and policy makers;

(E) encouraging the study of the sciences, the arts, and the humanities, including foreign languages and cultures;

(F) improving the data base of information on special populations and their educational status;

(G) conducting research on adult educational achievement, particularly literacy and illiteracy as it affects employment, crime, health, and human welfare;

(H) conducting research on postsecondary opportunities, especially access for minorities and women; and

(I) conducting research on education professionals, especially at the elementary and secondary levels including issues of recruitment, training, retention, and compensation.

(4) The Secretary shall publish proposed research priorities in the Federal Register every two years, not later than October 1, and shall allow a period of sixty days for public comments and suggesions.

(c)(1) The Council shall consist of fifteen members appointed by the President, by and with the advice and consent of the Senate. In addition, there shall be such ex officio members who are officers of the United States as the President may designate, including the Assistant Secretary. A majority of the appointed members of the Council shall constitute a quorum. The Chairman of the Council shall be designated by the President from among the appointed members. Ex officio members shall not have a vote on the Council. The members of the Council shall be appointed to ensure that the Council is broadly representative of the general public; the education professions, including practitioners; policymakers and researchers; and the various fields and levels of education.

(2)(A) Except as provided in subparagraph (B), members shall be appointed to terms of three years.

(B) Of the members first appointed—

(i) five shall be apointed for terms of one year;

(ii) five shall be appointed for terms of two years; and

(iii) five shall be appointed for terms of three years;

as designated by the President at the time of appointment.

(C) Any member appointed to fill a vacancy occurring before the expiration of the term for which the predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of a term until a successor has taken office.

(D) An appointed member who has been a member of the Council for six consecutive years shall be ineligible for appointment to the Council during the two-year period following the expiration of the sixth year.

(3) The Council shall—

(A) advise the Secretary and the Assistant Secretary on the policies and activities carried out by the Office;

(B) review and publicly comment on the policies and acitvities of the Office;

(C) conduct such activities as may be necessary to fulfill its functions under this subsection;

(D) prepare such reports to the Secretary on the activities of the Office as are appropriate; and

(E) submit, no later than March 31 of each year, a report to the President and the Congress on the activities of the Office, and on education, educational research, and data gathering in general.

(d)(1) In order to carry out the objectives of the Office under this section, the Secretary within the limits of available resources shall—

(A) conduct educational research;

(B) collect, analyze, and disseminate the findings of education reserach;

(C) train individuals in educational research;

(D) assist and foster such research, collection, dissemination, and training through grants, cooperative agreements, and technical assistance;

(E) promote the coordination of educational research and research support within the Federal Government and otherwise assist and foster such research; and

(F) collect, analyze, and disseminate statistics and other data related to education in the United States and other nations.

(2)(A) The Secretary may appoint, for terms not to exceed three years (without regard to the provisions of title 5 of the United States Code governing appointment in the competitive service) and may compensate (without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates) such scientific or professional employees of the Office as the Secretary considers necessary to accomplish its functions. The Secretary may also appoint and compensate not more than one-fifth of the number of full-time, regular scientific or professional employees of the Office without regard to such provisions. The rate of basic pay for such employees may not exceed the maximum annual rate of pay for grade GS-15 under section 5332 of title 5 of the United States Code, except that the pay of any employee employed before the date of enactment of the Higher Education Amendments of 1986 shall not be reduced by application of such maximum pay limitation.

(B) The Secaretary may reappoint employees described in subparagraph (A) upon presentation of a clear and convincing justification of need, for one additional term not to exceed three years. All such employees shall work on activities of the Office and shall not be reassigned to other duties outside the Office during their term.

(C) Individuals who are employed on the date of enactment of this Act and were employed by such Office on April 1, 1986, and who were employed under excepted hiring authority provided by section 209 of the Department of Education Organization Act or this section may continue to be employed for the duration of their current term.

(3)(A) The Secretary may carry out the activities in paragraph (1)—

(i) directly;

(ii) through grants, contracts, and cooperative agreements with institutions of higher education, public and private organizations, institutions, agencies, and individuals; and

(iii) through the provision of technical assistance.

(B) When making competitive awards under this subsection, the Secretary shall—

(i) solicit recommendations and advice regarding research priorities, opportunities, and strategies from qualified experts, such as education professionals and policymakers, personnel of the regional education laboratories [1] and of the research and development centers supported under paragraph (4), and the Council, as well as parents and other members of the general public;

(ii) employ suitable selection procedures utilizing the procedures and principles of peer review, except where such peer review procedures are clearly inappropriate given such factors as the relatively small amount of a grant or contract or the exigencies of the situation; and

(iii) determine that the activities assisted will be conducted efficiently, will be of high quality, and will meet priority research and development needs under this section.

(C) Whenever the Secretary enters into a cooperative agreement under this section, the Secretary shall negotiate any subsequent modifications in the cooperative agreement with all parties to the agreement affected by the modifications.

(4)(A) In carrying out the functions of the Office, the Secretary shall, in accordance with the provisions of this subsection, support—

(i) regional educational laboratories established by public agencies or private nonprofit organizations to serve the needs of a specific region of the Nation under the guidance of a regionally representative governing board, the regional agendas of which shall, consistent with the priority research and development needs established by subsection (b) (2) and (3), be determined by the governing boards of such labs;

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[1] So in law. Should be "regional educational laboratories".

(ii) research and development centers established by institutions of higher education, by institutions of higher education in consort with public agencies or private nonprofit organizations, or by interstate agencies established by compact which operate subsidiary bodies established to conduct postsecondary educational research and development;

(iii) meritorious unsolicited proposals for educational research and related activities that are authorized by this subsection; and

(iv) proposals that are specifically invited or requested by the Secretary, on a competitive basis, which meet objectives authorized by this subsection.

(B) Prior to awarding a grant or entering into a contract for a regional educational laboratory or research and development center under subparagraph (A)(i) or (A)(ii), the Secretary shall invite applicants to compete for such laboratories and centers through notice published in the Federal Register.

(C) Each application for assistance under subparagraph (A) (i) or (ii) as a regional educational laboratory or a research and development center shall contain such information as the Secretary may reasonably require, including assurances that the applicant will—

(i) be responsible for the conduct of the research and development activities;

(ii) prepare a long-range plan relating to the conduct of such research and development activities;

(iii) ensure that information developed as a result of such research and development activities, including new educational methods, practices, techniques, and products, will be appropriately disseminated;

(iv) provide technical assistance to appropriate educational agencies and institutions; and

(v) to the extent practicable, provide training for individuals, emphasizing training opportunities for women and members of minority groups, in the use of new educational methods, practices, techniques, and products developed in connection with such activities.

(D) No grant may be made and no contract entered into for assistance described under subparagraph (A) (i) or (ii) unless—

(i) proposals for assistance under this subsection are solicited from regional educational laboratories and research and development centers by the Office;

(ii) proposals for such assistance are developed by the regional educational laboratories and the research and development centers in consultation with the Office; and

(iii) the Office determines that the proposed activities will be consistent with the education research and development program and dissemination activities which are being conducted by the Office.

(E) No regional educational laboratory or research and development center receiving assistance under this subsection shall, by reason of the receipt of that assistance, be ineligible to receive any other assistance from the Office authorized by law.

(F) The Secretary shall make available adequate funds to support meritorious, unsolicited proposals as described under subparagraph (A)(iii), and provide sufficient notice of the availability of such funds to individual researchers in all regions of the country.

(5) The Secretary, from funds appropriated under this section, may establish and maintain research fellowships in the Office, for scholars, researchers, and statisticians engaged in the collection and dissemination of information about education and educational research. Subject to regulations published by the Secretary, fellowships may include such stipends and allowance, including travel and subsistence expenses provided for under title 5, United States Code, as the Secretary considers appropriate.

(6) The Secretary may award grants to institutions of higher education, including technical and community colleges as appropriate, to assess the new and emerging specialties and the technologies, academic subjects, and occupational areas requiring vocational education, with emphasis on the unique needs for preparing an adequate supply of vocational teachers of handicapped students. The Secretary shall give special consideration to the preparation required to teach classrooms of handicapped, or other highly targeted groups of students, in combination with other nonhandicapped or other nontargeted students, within the same vocational education setting.

(e)(1) There are authorized to be appropriated to carry out this section, $72,231,000 for fiscal year 1987 and such sums as may be necessary for each of the four succeeding fiscal years.

(2) The Secretary may not enter into a contract for the purpose of regional educational laboratories under subsection (d)(3)(A)(i) for a period in excess of five years.

(3) Not less than 95 per centum of funds appropriated pursuant to this subsection for any fiscal year shall be expended to carry out this section through grants, cooperative agreements, or contracts.

(4) When more than one Federal agency uses funds to support a single project under this section, the Office may act for all such agencies in administering those funds.

(f)(1) In each fiscal year for which the total amount appropriated to carry out this section and section 406 of this Act equals or exceeds the total amount appropriated for fiscal year 1986 to carry out such sections—

(A) not less than $17,760,000 shall be available in each fiscal year to carry out subsection (d)(4)(A)(ii) of this section (relating to centers);

(B) not less than $17,000,000 shall be available in each fiscal year to carry out subsection (d)(4)(A)(i) of this section (relating to labs);

(C) not less than $5,700,000 shall be available in each fiscal year to assist a separate system of 16 education resources information clearinghouses (including direct supporting dissemination services) pursuant to subsection (d)(3)(A) of this section, having the same functions and scope of work as the clearinghouses had on the date of enactment of the Higher Education Amendments of 1986;

(D) Not less than $9,500,000 for the fiscal year 1989, and such sums as may be necessary for each of the fiscal years 1990 through 1993, shall be available to carry out section 406(i) of this Act (relating to the National Assessment of Education Progress);

(E) not less than $8,750,000 shall be available in each fiscal year to carry out section 406 of this Act, except for subsection (i) of that section (relating to the Center for Educational Statistics); and

(F) not less than $500,000 shall be available in each fiscal year to carry out subsection (d)(4)(A)(iii) of this section (relating to field initiated research).

(2) If the sums appropriated for any fiscal year are less than the amount required to be made available under subparagraphs (A) through (F) of paragraph (1), then each of the amounts required to be made available under such subparagraphs shall be ratably reduced. If additional amounts become available for any such fiscal year, such reduced amounts shall be increased on the same basis as they were reduced.

(20 U.S.C. 1221e) Enacted June 23, 1972, P.L. 92-318, sec. 301(a)(2), 86 Stat. 328, 332; amended August 21, 1974, P.L. 93-380, sec. 502(b)(2)(B), 88 Stat. 560; amended October 12, 1976, P.L. 94-482, sec. 403, 90 Stat. 2227, 2228, 2229, 2230; amended Nov. 1, 1978, P.L. 95-561, sec. 1242, 92 Stat. 2352, 2353; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Oct. 3, 1980, P.L. 96-374, sec. 1311-1314, 94 Stat. 1498, 1499; amended Oct. 19, 1984, P.L. 98-511, secs. 702(a), 703, 704(a), 98 Stat 2405, 2406; amended Oct. 17, 1986, P.L. 99-498, §1401(a), 100 Stat. 1589; amended June 3, 1987, P.L. 100-50, §24(a), 101 Stat. 362; amended April 28, 1988, P.L. 100-297, secs. 3001(p), 3002, 3403(c), 102 Stat. 337, 349.

NATIONAL CENTER FOR EDUCATION STATISTICS

SEC. 406. (a)(1) There is established, within the Office of Educational Research and Improvement, a National Center for Education Statistics (hereafter[1] in this section referred to as the "Center"). The general design and duties of the National Center for Education Statistics shall be to acquire and diffuse among the people of the United States useful statistical information on subjects connected with education (in the most general and comprehensive sense of the word) particularly the retention of students, the assessment of their progress, the financing of institutions of education, financial aid to students, the supply of and demand for teachers and other school personnel, libraries, comparisons of the education of the United States and foreign nations and the means of promoting material, social, and intellectual prosperity through education.

(2)(A) The Center shall be headed by a Commissioner of Education Statistics who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioner of the National Center for Education Statistics shall have substantial experience and knowledge of programs encompassed by the National Center[2] The Commissioner shall be paid in accordance with section 5315 of title 5, United States Code. The Commissioner shall serve for terms of 4 years, except that the initial appointment shall commence June 21, 1991.

(B) There shall be within the Center (i) an Associate Commissioner for Statistical Standards and Methodology who shall be qualified in the field of mathematical statistics or statistical methodology;

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[1] So in original. "Hereafter" probably should be striken.

[2] So in original. Probably should be followed by a period.

and (ii) an Associate Commissioner for Data Collection and Dissemination, who shall be an individual who has extensive knowledge of uses of statistics for policy purposes at all levels of American education, and who shall promote the participation of States, localities, and institutions of higher education in designing education statistics programs, encourage widespread dissemination and use of the Center's data, and promote United States participation in international and regional education statistics. The Commissioner may appoint such other Associate Commissioners as may be necessary and appropriate.".

(b) The purpose of the Center shall be to collect, and analyze[1] and disseminate statistics and other data related to education in the United States and in other nations. The Center shall—

(1) if feasible, on a State-by-State basis, collect, collate, and, from time to time, report full and complete statistics on the conditions of education in the United States;

(2) conduct and publish reports on specialized analyses of the meaning and significance of such statistics;

(3) assist State and local educational agencies, including State agencies responsible for postsecondary education, in improving and automating their statistical and data collection activities (and shall establish a special program to train employees of such State and local agencies in the use of the Center's standard statistical procedures and concepts and may establish a fellows program to temporarily appoint such employees as fellows at the Center for the purpose of familiarization with the operations of the Center);

(4) review and report on educational activities in foreign countries;

(5) conduct a continuing survey of institutions of higher education and local educational agencies to determine the demand for, and the availability of, qualified teachers and administrative personnel, especially in critical areas within education which are developing or are likely to develop, and assess the extent to which programs administered in the Department of Education are helping to meet the needs identified as a result of such continuing survey; and

(6) access[2] periodically the current and projected supply and demand for elementary and secondary school teachers (including teachers at the pre-school level) and early childhood education development personnel with particular attention to—

(A) long-term and short-term needs for personnel in various subject areas or teaching specialities;

(B) shortages in particular types of schools or communities, and in States or regions;

(C) the number of minorities entering teaching;

(D) the proportions of women and minorities in educational administration, and the trends over time;

(E) the demographic characteristics, academic qualifications, job preparation, experience and skills of existing teachers and new entrants in the field of education;

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[1] So in law. Do not need "and".

[2] So in original. Probably should be "assess".

(F) the effect of the introduction of State mandated teacher competency tests on the demographic and educational characteristics of teachers and the supply of teachers; and

(G) the rate at which teachers leave teaching, their reasons for leaving, the sources of supply for new entrants, and the trends over time.

(c)(1) There shall be an Advisory Council on Education Statistics which shall be composed of 7 public members appointed by the Secretary and such ex officio members as are listed in subparagraph (2). Not more than 4 of the appointed members of the Council may be members of the same political party.

(2) The ex officio members of the Council shall be—

(A) the Assistant Secretary,

(B) the Director of the Census,

(C) the Commissioner of Labor Statistics,

(D) Commissioner[1] of Education Statistics, and;[2]

(E) Chairman,[3] National Commission on Libraries and Information Science.

(3) Appointed members of the Council shall serve for terms of 3 years, as determined by the Secretary, except that in the case of initially appointed members of the Council, they shall serve for shorter terms to the extent necessary that the terms of office of not more than 3 members expire in the same calendar year.

(4) The Commissioner of Education Statistics shall serve as the non-voting presiding officer of the Council.

(5)(A) The Council shall meet at the call of the presiding officer, except that it shall meet—

(i) at least four times during each calendar year; and

(ii) in addition, whenever three voting members request in writing that the presiding officer call a meeting.

(B) Six members of the Council shall constitute a quorum of the Council.

(6) The provisions of section 448(b) of part D of this title shall not apply to the Council established under this subsection.

(7) The Council shall review general policies for the operation of the Center and shall be responsible for advising on standards to insure[4] that statistics and analyses disseminated by the Center are of high quality and are not subject to political influence.

(8) The Commissioner may appoint such other ad hoc advisory committees as the Commissioner considers necessary.

(d)(1) The Commissioner shall, not later than June 1 of each year, submit to the Congress an annual report which—

(A) contains a description of the activities of the Center during the then current fiscal year and a projection of its activities during the succeeding fiscal year;

(B) sets forth estimates of the cost of the projected activities for such succeeding fiscal year; and

(C) includes a statistical report on the condition of education in the United States during the two preceding fiscal years and a projection, for the three succeeding fiscal years, of estimated statistics related to education in the United States.

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[1] So in original. Probably should read "the Commissioner".

[2] So in original. Probably should read "...Statistics; and".

[3] So in original. Probably should read "the Chairman".

[4] So in original. Probably should be "ensure".

(2) The Secretary shall submit annually a report to the Congress giving information of the State of Education in the Nation. In such report the Secretary shall clearly set forth the Secretary's views of critical needs in education and the most effective manner in which the nation and the Federal Government may address such needs.

(3) The Center shall develop and enforce standards designed to protect the confidentiality of persons in the collection, reporting, and publication of data under this section. This subparagraph shall not be construed to protect the confidentiality of information about institutions, organizations, and agencies receiving grants from or having contracts with the Federal Government.

(4)(A)[1] Except as provided in this section, no person may—

(i) use any individually identifiable information furnished under the provisions of this section for any purpose other than statistical purposes for which it is supplied;

(ii) make any publication whereby the data furnished by any particular person under this section can be identified; or

(iii) permit anyone other than the individuals authorized by the Commissioner to examine the individual reports; or

(B) No department, bureau, agency, officer, or employee of the Government, except the Commissioner of Education Statistics in carrying out the purposes of this section, shall require, for any reason, copies of reports which have been filed under this section with the Center for Education Statistics or retained by any individual respondent. Copies of such reports which have been so retained or filed with the Center or any of its employees or contractors or agents shall be immune from legal process, and shall not, without the consent of the individual concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding. This subsection shall only apply to individually identifiable data (as defined in subparagraph (E)).[2]

(C) Whoever, being or having been an employee or staff member appointed under the authority of the Commissioner or in accordance with this section of the Act, having taken and subscribed the oath of office, or having sworn to observe the limitations imposed by subsection (a), knowingly publishes or communicates any individually identifiable information (as defined in subparagraph (E)), the disclosure of which is prohibited under the provisions of subparagraph (A), and which comes into his or her possession by reason of employment (or otherwise providing services) under the provisions of this section, shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(D) The Commissioner may utilize temporary staff, including employees of Federal, State, or local agencies or instrumentalities including local education agencies, and employees of private organizations to assist the Center in performing the work authorized by this section, but only if such temporary staff is sworn to observe the limitations imposed by this section.

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[1] So in original. Should be full measure. See P.L. 100-297, sec. 3001(m), 102 Stat. 335.

[2] So in original. Probably should be subparagraph "(F)".

(E) No collection of information or data acquisition activity undertaken by the Center shall be subject to any review, coordination or approval procedure except as required by the Director of the Office of Management and Budget under the rules and regulations established pursuant to chapter 35 of title 44, United States Code.

(F) For the purposes of this section—

(i) the term "individually identifiable information" means any record, response form, completed survey or aggregation thereof from which information about individual students, teachers, administrators or other individual persons may be revealed;

(ii) the term "report" means a response provided by or about an individual to an inquiry from the Center and does not include a statistical aggregation from which individually identifiable information cannot be revealed; and

(iii) as used in clause (i), the term "persons" does not include States, local educational agencies, or schools.

(G)(i) This paragraph shall not apply to—

(I) the survey required by section 1303(c) of the Higher Education Amendments of 1986; or

(II) to any longitudinal study concerning access, choice, persistence progress, or attainment in postsecondary education.

(ii) Any person, except those sworn to observe the limitation of this subsection, who uses any data as described in clause (i) provided by the Center, in conjunction with any other information or technique (including de-encryption), to identify any individual student, teacher, administrator, or other person and who discloses, publishes, or uses for a purpose other than that for which it was collected, or who otherwise violates clause (i) or (ii) of subparagraph (A), shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(iii) No employee or staff member of the Center or of an institution of higher education may be found criminally liable under subparagraph (C), based on a violation of subparagraph (A) or clause (i), if such employee or staff member has taken reasonable precautions, consistent with the purpose of this section, to ensure the confidentiality of data made available to the public.

(H) Nothing in this paragraph shall restrict the right of the Comptroller General of the United States to gain access to any reports or other records, including information identifying individuals, in the Center's possession; except that the same restrictions on disclosure that apply to the Center under subparagraphs (B) and (G) shall apply to the General Accounting Office.

(e)(1) The Center is authorized to furnish transcripts or copies of tables and other statistical records and make special statistical compilations and surveys for State and local officials, public and private organizations, and individuals. The Center shall provide State and local educational agencies opportunities to suggest the development of particular compilations of statistics, surveys, and analyses that would assist those educational agencies. The Center shall furnish such special statistical compilations and surveys as the Committees on Labor and Human Resources and on Appropriations of the Senate and the Committees on Education and Labor and on Appropriations of the House of Representatives may request. Such statistical compilations and surveys, other than those carried out pursuant to the preceding sentence, shall be made subject to the payment of the actual or estimated cost of such work. In the case of nonprofit organizations or agencies, the Secretary may engage in joint statistical projects, the cost of which shall be shared equitably as determined by the Secretary: *Provided*, That the purposes of such projects are otherwise authorized by law. All funds received in payment for work or services described in this paragraph shall be deposited in a separate account which may be used to pay directly the costs of such work or services, to repay appropriations which initially bore all or part of such costs, or to refund excess sums when necessary.

(2)(A) The Center shall participate with other Federal agencies having a need for educational data in forming a consortium for the purpose of providing direct joint access with such agencies to all educational data received by the Center through automated data processing. The Library of Congress, General Accounting Office, and the Committees on Labor and Human Resources and Appropriations of the Senate and the Committees on Education and Labor and Appropriations of the House of Representatives shall, for the purposes of this subparagraph, be considered Federal agencies.

(B) The Center shall, in accordance with regulations published for the purpose of this paragraph, provide all interested parties, including public and private agencies and individuals, direct access to data collected by the Center for purposes of research and acquiring statistical information.

(3)[1] In carrying out any authorized responsibilities under this section, the Commissioner may enter into contracts under regular competitive procedures of the Federal Government or other financial arrangements. Contracts or financial arrangements may also include sole source contracts with States, additional institutions, organizations performing international studies, and associations that are nationally representative of a wide variety of States or nonpublic schools. The Commissioner shall submit annually a report to the appropriate committees of the Congress, listing each sole source contract, its purpose, and the reasons why competitive bidding was not feasible in each such instance.

(4) The Commissioner is authorized to prepare and publish such information and documents as may be of value in carrying out the purposes of this section. Periodically, the Commissioner shall issue a regular schedule of publications.

(5) In addition to the condition of education report under subsection (d), the Commissioner is authorized to make special reports on particular subjects whenever required to do so by

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[1] So in original. Margin should be full measure for paragraphs (3)-(9).

the President or either House of Congress or when considered appropriate by the Commissioner.

(6) The Commissioner is authorized to use information collected by other offices in the Department of Education and by other executive agencies and to enter into interagency agreements for the collection of statistics for the purposes of this section. The Commissioner is authorized to arrange with any agency, organization, or institution for the collection of statistics for the purposes of this section and may assign employees of the Center to any such agency, organization, or institution to assist in such collection.

(7) The Commissioner is authorized to use the statistical method known as sampling to carry out this section. Data may be collected from States, local educational agencies, schools, libraries, administrators, teachers, students, the general public, and such other individuals, persons, organizations, agencies, and institutions as the Commissioner may consider appropriate.

(8) To assure the technical quality and the coordination of statistical activities of the Department, the Commissioner shall provide technical assistance to Department offices that gather data for statistical purposes. Such assistance may include a review of and advice on data collection plans, survey designs and pretests, the management of data, and the quality of reporting of data.

(9) The Commissioner is authorized to—

(A) select, appoint, and employ such officers and employees as may be necessary to carry out the functions of the Center, subject to the provisions of title 5, United States Code (governing appointments in the competitive service), and the provisions of chapter 51 and subchapter III of chapter 53 of such title (relating to classification and General Schedule pay rates); and

(B) notwithstanding any other provision of this Act, to obtain services as authorized by section 3109 of title 5, United States Code, at a rate not to exceed the equivalent daily rate payable for grade GS-18 of the General Schedule under section 5332 of such title.

(f)(1)[1] There are authorized to be appropriated for the purposes of this section (including salaries and expenses) $42,323,000 for fiscal year 1989, and such sums as may be necessary for each of the fiscal years 1990, 1991, 1992, and 1993.

(2)[2] The Commissioner may contract with States to carry out subsection (h). Such contracts may not exceed the additional cost to the State—

(A) of meeting the information and data gathering requirements in compliance with such subsection; or

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[1] Section 405(f)(1)(D) reserves a minimum amount to carry out subsection (i), relating to the National Assessment of Educational Progress, in each fiscal year in which amounts appropriated to carry out section 405 and this section exceed amounts appropriated for such purpose in the fiscal year 1986.

[2] So in original. Margins should conform to (f)(1). Subparagraphs (A) and (B) should be indented 2 ems only.

(B) for compliance with related efforts of the National Center for Education Statistics to achieve comparable and uniform data consistent with the purposes of this subsection.

(g)(1) In addition to its other responsibilities, the Center shall collect uniform data from the States on the financing of elementary and secondary education. Each State receiving funds under the Education Consolidation and Improvement Act of 1981 shall cooperate with the Center in this effort.

(2)[1] In addition to other duties of the Commissioner under this section, it shall be the responsibility of the Commissioner to issue regular public reports to the President and Congress on dropout and retention rates, results of education, supply and demand of teachers and school personnel, libraries, financial aid and on such other education indicators as the Commissioner determines to be appropriate.

(3) The Commissioner shall establish a special study panel to make recommendations concerning the determination of education indicators for study and report under paragraph (2). Not more than 18 months after the date of the enactment of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, the Commissioner shall submit the report of the panel to the appropriate committees of the Congress. The panel shall cease to exist 6 months after the date of such submission.

(4)(A) The Center shall conduct an annual national survey of dropout and retention rates as an education indicator.

(B) The Commissioner shall appoint a special task force to develop and test an effective methodology to accurately measure dropout and retention rates. Not later than 1 year after the date of enactment of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, the task force shall submit a report of its recommendations, including procedures for implementation of such recommendations, to the Commissioner and the appropriate committees of the Congress.

(C) On the second[2] Tuesday after Labor Day of 1989 and on each such Tuesday thereafter, the Center shall submit a report to the appropriate committees of the Congress of the dropout and retention rate prevailing on March 30 of each such year.

(5)(A) As of March 30, 1990, and not less than every 3 years thereafter, the Center shall conduct a national study and survey of financial aid in accordance with the provisions of section 1303(c) of the Higher Education Amendments of 1986. The Center shall submit a report to the appropriate committees of the Congress concerning the findings of such study[3]

(B) Concurrent with each survey, the Center.[4] shall conduct longitudinal studies of freshman and graduating students concerning access, choice, persistence progress, curriculum and attainment. Such studies shall evaluate such students at 3 points over a 6-year interval.

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[1] So in original. Margin should be full measure for paragraphs (2)-(8)

[2] So in law. Probably should read "On the second Tuesday after Labor Day of 1989 and on the second Tuesday after Labor Day of each succeeding year".

[3] So in original. Probably should be followed by a period.

[4] So in original. Period probably should be deleted.

(6) On April 1, 1993, and every 10 years thereafter, the Center shall submit a report to the appropriate committees of the Congress concerning the social and economic status of children who reside in the areas served by different local educational agencies. Such report shall be based on data collected during the most recent decennial census.

(7) The Center shall conduct a study of a statistically relevant sample of students enrolled in elementary and secondary school and postsecondary education training concerning educational progress, intellectual development, and economic prosperity. The study shall collect data on participation in higher education, including enrollment, persistence, and attainment. Such study shall evaluate such students by such criteria at 2-year intervals. As of February 1, 1989, and every 8 years thereafter, the Commissioner shall select a sample of students enrolled in school for this study.

(8) The Center with the assistance of State library agencies, shall develop and support a cooperative system of annual data collection for public libraries. Participation shall be voluntary; however, all States should be encouraged to join the system. Attention should be given to insuring[1] timely, consistent and accurate reporting.

(9) The National Center for Education Statistics shall conduct a study on the effects of higher standards prompted by school reform efforts on student enrollment and persistence. The study shall examine academic achievement, and graduation rates of low-income, handicapped, limited English proficient, and educationally disadvantaged students.

(h)(1) There is established within the Center a National Cooperative Education Statistics System (hereafter[2] referred to in this subsection as the "System"). The purpose of the System is to produce and maintain, with the cooperation of the States, comparable and uniform educational information and data that are useful for policymaking at the Federal, State, and local level.

(2) Each State that desires to participate in the system shall—

(A) first develop with the Center the information and data-gathering requirements that are needed to report on the condition and progress of elementary and secondary education in the United States, such as information and data on—

(i) schools and school districts;

(ii) students and enrollments, including special populations;

(iii) the availability and use of school libraries and their resources;

(iv) teachers, librarians, and school administrators;

(v) the financing of elementary and secondary education;

(vi) student outcomes, including scores on standardized tests and other measures of educational achievement; and

(vii) the progress of education reform in the States and the Nation; and

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[1] So in original. Probably should be "ensuring".
[2] So in original. "Hereafter" probably should be striken

(B) then enter into an agreement with the Center for that fiscal year to comply with those information and data-gathering requirements.

(3) To establish and maintain the system,[1] the Commissioner—

(A) shall—

(i) provide technical assistance to the States regarding the collection, maintenance, and use of the System's data, including the timely dissemination of such data; and

(ii) to the extent possible, implement standard definitions and data collection procedures; and

(B) may—

(i) directly, or through grants, cooperative agreements, or contracts, conduct research, development, demonstration, and evaluation activities that are related to the purposes of the System; and

(ii) prescribe appropriate guidelines to ensure that the statistical activities of the States participating in the System produce data that are uniform, timely, and appropriately accessible.

(i)(1) With the advice of the National Assessment Governing Board established by paragraph (5)(a)(i), the Commissioner shall carry out, by grants, contracts, or cooperative agreements with qualified organizations, or consortia thereof, a National Assessment of Educational Progress. The National Assessment of Educational Progress shall be placed in the National Center for Education Statistics and shall report directly to the Commissioner for Educational Statistics. The purpose of the National Assessment is the assessment of the performance of children and adults in the basic skills of reading, mathematics, science, writing, history/geography, and other areas selected by the Board.

(2)(A) The National Assessment shall provide a fair and accurate presentation of educational achievement in skills, abilities, and knowledge in reading, writing, mathematics, science, history/geography, and other areas specified by the Board, and shall use sampling techniques that produce data that are representative on a national and regional basis and on a State basis pursuant to subparagraphs (C)(i) and (C)(ii). In addition, the National Assessment shall—

(i) collect and report data on a periodic basis, at least once every 2 years for reading and mathematics; at least once every 4 years for writing and science; and at least once every 6 years for history/geography and other subject areas selected by the Board;

(ii) collect and report data every 2 years on students at ages 9, 13, and 17 and in grades 4, 8, and 12;

(iii) report achievement data on a basis that ensures valid reliable trend reporting;[3]

(iv) include information on special groups.

(B) In carrying out the provisions of subparagraph (A), the Secretary and the Board appointed under paragraph (5) shall assure that at least 1 of the subject matters in each of the 4 and 6 year cycles described in subparagraph (A)(i) will be included in each 2 year cycle Assessment.

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[1] So in original. Probably should be capitalized.

[2] So in original. Probably should be "(5)(A)(i)".

[3] So in original. Probably should be "; and".

(C)(i) The National Assessment shall develop a trial mathematics assessment survey instrument for the eighth grade and shall conduct a demonstration of the instrument in 1990 in States which wish to participate, with the purpose of determining whether such an assessment yields valid, reliable State representative data.

(ii) The National Assessment shall conduct a trial mathematics assessment for the fourth and eighth grades in 1992 and, pursuant to subparagraph (6)(D),[1] shall develop a trial reading assessment to be administered in 1992 for the fourth grade in States which wish to participate, with the purpose of determining whether such an assessment yields valid, reliable State representative data.

(iii) The National Assessment shall ensure that a representative sample of students participate in such assessments.

(iv) No State may agree to participate in the demonstration described in this subsection without full knowledge of the process for consensus decisionmaking on objectives to be tested, required in paragraph (6)(E), and of assessment demonstration standards for sampling, test administration, test security, data collection, validation and reporting. States wishing to participate shall sign an agreement developed by the Commissioner. A participating State shall review and give permission for release of results from any test of its students administered as a part of this demonstration prior to the release of such data. Refusal by a State to release its data shall not restrict the reporting of data from other States that have approved the release of such data.

(v) The Commissioner shall provide for an independent evaluation conducted by a nationally recognized organization (such as the National Academy of Sciences or the National Academy of Education) of the pilot programs to assess the feasibility and validity of assessments and the fairness and accuracy of the data they produce. The report shall also describe the technical problems encountered and a description about what was learned about how to best report data from the National Assessment of Educational Progress. The results of this report will be provided to the Congress and to States which participated in assessments pursuant to paragraph (C) (i) and (ii) within 18 months of the time such assessments were conducted.

(D)(i)[2] The National Assessment shall have the authority to develop and conduct, upon the direction of the Board and subject to the availability of appropriations, assessments of adult literacy.

(3)(A) The National Assessment shall not collect any data that are not directly related to the appraisal of educational performance, achievements, and traditional demographic reporting variables, or to the fair and accurate presentation of such information.

(B) The National Assessment shall provide technical assistance to States, localities, and other parties that desire to participate in the assessment to yield additional information described in paragraph (2).

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[1] So in original. Probably should be "paragraph (6)(D)".
[2] So in original.

(4)(A) Except as provided in subparagraph (B), the public shall have access to all data, questions, and test instruments of the National Assessment.

(B)(i) The Commissioner shall ensure that all personally identifiable information about students, their educational performance, and their families and that information with respect to individual schools remain confidential, in accordance with section 552a of title 5, United States Code.

(ii) Notwithstanding any other provision of the law, the Secretary may decline to make available to the public for a period not to exceed 10 years following their initial use cognitive questions that the Secretary intends to reuse in the future.

(C) The use of National Assessment test items and test data employed in the pilot program authorized in subsection (2)(C) to rank, compare, or otherwise evaluate individual students, schools, or school districts is prohibited.

(5)(A)(i) There is established the National Assessment Governing Board (hereafter[1] in this section referred to as the "Board").

(ii) The Board shall formulate the policy guidelines for the National Assessment.

(B) The Board shall be appointed by the Secretary in accordance with this subparagraph and subparagraphs (C), (D), and (E). The Board shall be composed of—

(i) two Governors, or former Governors, who shall not be members of the same political party;

(ii) two State legislators, who shall not be members of the same political party;

(iii) two chief State school officers;

(iv) one superintendent of a local educational agency;

(v) one member of a State board of education;

(vi) one member of a local board of education;

(vii) three classroom teachers representing the grade levels at which the National Assessment is conducted;

(viii) one representative of business or industry;

(ix) two curriculum specialists;

(x) two testing and measurement experts;

(xi) one nonpublic school administrator or policymaker;

(xii) two school principals, one elementary and one secondary;

(xiii) three additional members who are representatives of the general public, including parents.

The Assistant Secretary for Educational Research and Improvement shall serve as an ex officio member of the Board as a nonvoting member.

(C)(i) The Secretary and the Board shall ensure at all times that the membership of the Board reflects regional, racial, gender and cultural balance and diversity and that it exercises its independent judgment, free from inappropriate influences and special interests.

(ii) In the exercise of its functions, powers, and duties, the Board shall hire its own staff and shall be independent of the Secretary and the other offices and officers of the Department of Education.

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[1] So in original. "Hereafter" probably should be striken.

(iii) The Secretary may appoint, at the direction of the Board, for terms not to exceed 3 years, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, not more than 6 technical employees to administer this subsection who may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

(D)(i) The members of the Assessment Policy Committee, serving on the date of enactment of the National Assessment of Educational Progress Improvement Act, shall become members of the Board for the remainder of the terms of the appointment to the Assessment Policy Committee.

(ii) To complete the initial membership of the Board, the Secretary shall appoint members of the Board as necessary in the categories described in subparagraph (B) for which there are no members continuing from the Assessment Policy Committee on the date of enactment of the National Assessment of Educational Progress Improvement Act. The Secretary shall appoint such members from among nominees furnished by the Governors, chief State school officers, education associations and organizations, the National Academy of Sciences, the National Academy of Education, parent organizations, and learned societies.

(iii) As vacancies occur, new members of the Board shall be appointed by the Secretary from among individuals who are nominated by the Board after consultation with representatives of the groups listed in subparagraph (B). For each vacancy the Board shall nominate at least 3 individuals who, by reason of experience or training, are qualified in that particular Board vacancy.

(E) Members of the Board appointed in accordance with this paragraph shall serve for terms not to exceed 4 years which shall be staggered, as determined by the Secretary, subject to the provisions of subparagraph (D)(i). Any appointed member of the Board who changes status under subparagraph (B) during the term of the appointment of the member may continue to serve as a member until the expiration of that term.

(6)(A) In carrying out its functions under this subsection, the Board shall be responsible for—

(i) selecting subject areas to be assessed (consistent with paragraph (2)(A));

(ii) identifying appropriate achievement goals for each age and grade in each subject area to be tested under the National Assessment;

(iii) developing assessment objectives;

(iv) developing test specifications;

(v) designing the methodology of the assessment;

(vi) developing guidelines and standards for analysis plans and for reporting and disseminating results;

(vii) developing standards and procedures for interstate, regional and national comparisons; and

(viii) taking appropriate actions needed to improve the form and use of the National Assessment.

(B) The Board may delegate any functions described in subparagraph (A) to its staff.

(C) The Board shall have final authority on the appropriateness of cognitive items.

(D) The Board shall take steps to ensure that all items selected for use in the National Assessment are free from racial, cultural, gender, or regional bias.

(E) Each learning area assessment shall have goal statements devised through a national consensus approach, providing for active participation of teachers, curriculum specialists, local school administrators, parents and concerned members of the general public.

(F) The Secretary shall report to the Board at regular intervals of the Department's action to implement the decisions of the Board.

(G) Any activity of the Board or of the organization described in paragraph (1), shall be subject to the provisions of this subsection.

(7)(A) Not to exceed 10 percent of the funds available for this subsection may be used for administrative expenses (including staff, consultants and contracts authorized by the Board) and to carry out the functions described in paragraph (6)(A).

(B) For the purposes of its administrative functions, the Board shall have the authorities authorized by the Federal Advisory Committee Act and shall be subject to the open meeting provisions of that law.

(8)(A) Participation in the National and Regional Assessments by State and local educational agencies shall be voluntary.

(B) Participation in assessments made on a State basis shall be voluntary. The Secretary shall enter into an agreement with any State which desires to carry out an assessment for the State under this subsection. Each such agreement shall contain provisions designed to assure—

(i) that the State will participate in the assessment;

(ii) that the State will pay from non-Federal sources the non-Federal share of participation; and

(iii) that the State agrees with the terms and conditions specified in subsection (a)(2)(C)(iv).

(C)(i) For each fiscal year, the non-Federal share for the purpose of clause (ii) of subparagraph (B) shall be the cost of conducting the assessment in the State including the cost of administering the assessment at the school level for all schools in the State sample and the cost of coordination within the State.

(ii) The non-Federal share of payments under this paragraph may be in cash or in kind.

(9)(A) The Commissioner shall provide for continuing reviews of the National Assessment, including validation studies by the National Center for Education Statistics and solicitation of public comment on the conduct and usefulness of the National Assessment. The Secretary shall report to the Congress, the President, and the Nation on the findings and recommendations of such reviews. The Commissioner shall consider the findings and recommendations in designing the competition to select the organization through which the Office carries out the National Assessment.

(B) The Commissioner shall, not later than 6 months after the date of enactment of the National Assessment of Educational Progress Improvement Act, publish a report setting forth plans for the collection of data for the 1990 assessment and plans for including other subject areas in the 1992 and later assessments. The report shall include methods by which the results of the National

Assessment of Educational Progress may be reported so that the results are more readily available and more easily understood by educators, policymakers, and the general public, and methods by which items will be reviewed to identify and exclude items which reflect racial, cultural, gender, or regional bias. The report shall be developed after consultation with educators, State education officials, members of the Board appointed under paragraph (5), and the general public.

(C) The report required by this paragraph shall be submitted to the Congress and made available to the public. The appropriate authorizing committees of the Congress may request the Secretary to modify the plan contained in the report. The Secretary shall take such actions as may be appropriate to carry out the recommendations contained in the report.

(j) For purposes of this section, the terms "United States" and "State" include the District of Columbia and Puerto Rico.

(20 U.S.C. 1221e-1) Enacted August 21, 1974, P.L. 93-380, sec. 501(a), 88 Stat. 556, 558; amended April 21, 1976, P.L. 94-273, sec. 12(1), 90 Stat. 378; amended October 12, 1976, P.L. 94-482, sec. 401(c), 90 Stat. 2226; sec. 406, 90 Stat. 2231, 2232; sec. 501(q), 90 Stat. 2238; amended Nov. 1, 1978, P.L. 95-561, secs. 1201, 1212(a), (c), 1243(a), 92 Stat. 2333, 2334, 2338, 2341, 2353; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Oct. 19, 1984, P.L. 98-511, secs. 702(b), 704(b), 98 Stat. 2406; amended Oct. 17, 1986, P.L. 99-498, sec. 1402, 100 Stat. 1597; amended June 3, 1987, P.L. 100-50, §24(b), 101 Stat. 363; amended April 28, 1988, P.L. 100-297, secs. 3001, 3403(a), 102 Stat. 331, 344; amended November 16, 1990, P.L. 101-589, sec. 252, 104 Stat. 2894.

RESPONSIBILITY OF STATES TO FURNISH INFORMATION

SEC. 406A. (a) The Commissioner shall require that each State submit to him, within ninety days after the end of any fiscal year, a report on the uses of Federal funds in that State under any applicable program for which the State is responsible for administration. Such report shall—

(1) list all grants and contracts made under such program to the local educational agencies and other public and private agencies and institutions within such State during such year;

(2) include the total amount of funds available to the State under each such program for such fiscal year and specify from which appropriation Act or Acts these funds were available; and

(3) be made readily available by the State to local educational agencies and other public and private agencies and institutions within the State, and to the public.

(b) On or before March 31 of each year, the Commissioner shall submit to the Committee on Labor and Human Resources of the Senate and to the Committee on Education and Labor of the House of Representatives an analysis of these reports and a compilation of statistical data derived therefrom.

(20 U.S.C. 1221e-1a) Enacted August 21, 1974, P.L. 93-380, sec. 512(a), 88 Stat. 571 amended April 21, 1976, P.L. 94-273, sec. 17, 90 Stat. 379; amended October 12, 1976 P.L. 94-482, sec. 501(f)(2), (f)(3), 90 Stat. 2237; redesignated Nov. 1, 1978, P.L. 95-561 sec. 1231(a)(2), 92 Stat. 2342; see also general reference Oct. 17, 1979, P.L. 96-88, sec 301, 93 Stat. 677; amended December 8, 1983, P.L. 97-211, sec. 18, 97 Stat. 1417.

AUTHORIZATION OF APPROPRIATIONS FOR SCIENCE EDUCATION PROGRAMS

SEC. 406B. There is authorized to be appropriated to the Secretary of Education for fiscal year 1981—

(1) $2,500,000 for the purpose of carrying out the Pre-College Science Teacher Training program, and

(2) $5,000,000 for the purpose of carrying out the Minority Institutions Science Improvement program transferred to the Secretary from the National Science Foundation by section 304 of the Department of Education Organization Act.

(20 U.S.C. 1221e-1b) Enacted October 3, 1980, P.L. 96-374, sec. 1303, 94 Stat. 1497; amended Nov. 22, 1985, P.L. 99-159, 99 Stat. 903.

AUTHORIZATION OF APPROPRIATIONS FOR SCIENCE IMPROVEMENT PROGRAM

SEC. 406C. There are authorized to be appropriated $5,000 for each of the fiscal years 1985 and 1986 for the purpose of carrying out the Minority Insitutions Science Improvement Program transferred to the Secretary of Education from the National Science Foundation by section 304 of the Department of Education Organization Act.

(20 U.S.C. 1221e-1c) Enacted Nov. 22, 1985, P.L. 99-159, 99 Stat. 903.

RULES FOR EDUCATION OFFICERS OF THE UNITED STATES

SEC. 407. (a) For the purposes of this section, the term "education officer of the United States" means any person appointed by the President pursuant to this part, except members of commissions, councils, and boards.

(b) Each education officer of the United States shall serve at the pleasure of the President.

(c) No education officer of the United States shall engage in any other business, vocation, or employment while serving in the position to which he is appointed; nor may he, except with the express approval of the President in writing, hold any office in, or act in any capacity for, or have any financial interest in, any organization, agency, or institution to which an agency in the Education Division makes a grant or with which any such agency makes a contract or any other financial arrangement.

(d) No person shall hold, or act for, more than one position as an education officer of the United States for more than a 30 day period.

(20 U.S.C. 1221e-2) Enacted August 21, 1974, P.L. 93-380, sec. 502(a)(1), 88 Stat. 559.

GENERAL AUTHORITY OF ADMINISTRATIVE HEADS OF EDUCATION AGENCIES

SEC. 408. (a) Each administrative head of an education agency, in order to carry out functions otherwise vested in him by law or by delegation of authority pursuant to law, is, subject to limitations as may be otherwise imposed by law, authorized—

(1) to make, promulgate, issue, rescind, and amend rules an regulations governing the manner of operation of, and goverr ing the applicable programs administered by the agency c which he is head;

(2) in accordance with those provisions of title 5, Unite States Code, relating to the appointment and compensation c personnel and subject to such limitations as are imposed i this part, to appoint and compensate such personnel as may b necessary to enable such agency to carry out its functions;

(3) to accept unconditional gifts or donations of service money, or property (real, personal, or mixed; tangible or intangible);

(4) without regard for section 3648 of the Revised Statutes o the United States (31 U.S.C. 529), to enter into and perforn such contracts, leases, cooperative agreements, or other transactions as may be necessary for the conduct of such agency;

(5) with funds expressly appropriated for such purpose, t construct such facilities as may be necessary to carry out functions vested in him or in the agency of which he is head, an to acquire and dispose of property; and

(6) to use the services of other Federal agencies and reimburse such agencies for such services.

(b) The administrative head of an education agency shall ensur that, in contracting under the authority of this section for the services of independent persons in the competitive review of grant applications, all such persons are qualified, by education and experience, to perform such services. The qualifications of such person and the terms of such contracts, other than information whicl identify such person, shall be readily made available to the public

(c) Any administrative head of an education agency is, subject t any other limitations on delegations of authority provided by law authorized to delegate any of his functions under this section to a officer or employee of that agency.

(d) For the purposes of this title, the term "administrative hea of an education agency" means the Commissioner and the Directo of the National Institute of Education. To the extent that the Assistant Secretary is directly responsible for the administration of program and to the extent that the Assistant Secretary is responsible for the supervision of the National Center for Education Statistics, the Assistant Secretary shall, for such purposes, be considere within the meaning of such term.

(20 U.S.C. 1221e-3) Enacted August 21, 1974, P.L. 93-380, sec. 502(a)(1), 88 Stat 559, 560; amended Nov. 1, 1978, P.L. 95-561, secs. 1243(b), (c), 1244, 92 Stat. 2353; se also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

EDUCATION IMPACT STATEMENT

Sec. 409. Notwithstanding any other provision of law, no regulation affecting any institution of higher education in the Unitec States, promulgated on or after the date of enactment of this Act shall become effective unless such agency causes to be published ir the Federal Register a copy of such proposed regulation togethei with an educational impact assessment statement which shall determine whether any information required to be transmitted undei such regulation is already being gathered by or is available fror any other agency or authority of the United States. Notwithstanding the exception provided under section 553(b) of title 5, United States Code, such statement shall be based upon the record established under the provisions of section 553 of title 5, United States Code, compiled during the rulemaking proceeding regarding such regulation.

(20 U.S.C. 1221e-4) Enacted October 3, 1980, P.L. 96-374, sec. 1306, 94 Stat. 1498.

PART B—APPROPRIATIONS AND EVALUATIONS

Subpart 1—Appropriations

ADVANCE FUNDING

SEC. 411. To the end of affording the responsible State, local, and Federal officers concerned adequate notice of available Federal financial assistance for education, appropriations for grants, contracts, or other payments under any applicable program are authorized to be included in the appropriation Act for the fiscal year preceding the fiscal year for which they are available for obligation. In order to effect a transition to this method of timing appropriation action, the preceding sentence shall apply notwithstanding that its initial application under such program will result in the enactment in the same year (whether in the same appropriation Act or otherwise) of two separate appropriations, one for the then current fiscal year and one for the succeeding fiscal year.

(20 U.S.C. 1223) Enacted Jan. 2, 1968, P.L. 90-247, sec. 403, 81 Stat. 814; amended April 13, 1970, P.L. 92-230, sec. 401(a)(4), 84 Stat. 165; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; redesignated August 21, 1974, P.L. 93-380, sec. 506(a)(1)(C), 88 Stat. 562.

AVAILABILITY OF APPROPRIATIONS ON ACADEMIC OR SCHOOL YEAR BASIS

SEC. 412. (a) Appropriations for any fiscal year for grants, loans, contracts, or other payments to educational agencies or institutions under any applicable program may, in accordance with regulations of the Secretary, be made available for expenditure by the agency or institution concerned on the basis of an academic or school year differing from such fiscal year.

(b) Notwithstanding any other provision of law, unless enacted in specific limitation of the provisions of this subsection, any funds from appropriations to carry out any programs to which this title is applicable during any fiscal year which are not obligated and expended by educational agencies or institutions prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditure by such agencies and institutions during such succeeding fiscal year.

(2) Any funds under any applicable program which, pursuant to paragraph (1), are available for obligation and expenditure in the year succeeding the fiscal year for which they were appropriated shall be obligated and expended in accordance with—

(A) the Federal statutory and regulatory provisions relating to such program which are in effect for such succeeding fiscal year, and

(B) any program plan or application submitted by such educational agencies or institutions for such program for such succeeding fiscal year.

(c) If any funds appropriated to carry out any applicable program are not obligated pursuant to a spending plan submitted in accordance with section 3679(d)(2) of the Revised Statutes and become available for obligation after the institution of a judicial proceeding seeking the release of such funds, then such funds shall be available for obligation and expenditure until the end of the fiscal year which begins after the termination of such judicial proceeding.

(20 U.S.C. 1225) Enacted Jan. 2, 1968, P.L. 90-247, sec. 405, 81 Stat. 815; amended April 13, 1970, P.L. 91-230, sec. 401(a) (5), (7), (8), 84 Stat. 165; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326, redesignated and amended, August 21, 1974, P.L. 93-380, sec. 506(a)(1), 88 Stat. 562, 563; amended April 21, 1976, P.L. 94-273, sec. 3(12), 90 Stat. 376.; amended Sept. 24, 1977, P.L. 95-112, sec. 5, 91 Stat. 912; amended Nov. 1, 1978, P.L. 95-561, sec. 1245, 92 Stat. 2354.

AVAILABILITY OF APPROPRIATIONS

SEC. 413. Notwithstanding any other provision of law, unless expressly in limitation of the provisions of this title, funds appropriated for any fiscal year to carry out any of the programs to which this title is applicable shall remain available for obligation and expenditure until the end of such fiscal year.

(20 U.S.C. 1226) Enacted Oct. 16, 1968, P.L. 90-576, sec. 301(b), 82 Stat. 1094; amended April 13, 1970, P.L. 91-230, sec. 401(a)(9), 84 Stat. 166; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 93-380, sec. 506(a)(2), 88 Stat. 563.

CONTINGENT EXTENSION OF PROGRAMS

SEC. 414.[1] (a) Unless the Congress in the regular session which ends prior to the beginning of the terminal fiscal year—

(1) of the authorization of appropriations for an applicable program; or

(2) of the duration of an applicable program;

either—

(A) has passed or has formally rejected legislation which would have the effect of extending the authorization or duration (as the case may be) of that program; or

(B) by action of either the House of Representatives or the Senate, approves a resolution stating that the provisions of this section shall no longer apply to such program;

such authorization or duration is hereby automatically extended for—

(i) two additional fiscal years for any applicable program authorized to be included in the Appropriation Act for the fiscal year preceding the fiscal year for which appropriations are available for obligation, or

(ii) one additional fiscal year for any other applicable program

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[1] Section 327 of Part B of Title III of P.L. 94-482 provides as follows:

The provisions of section 414 of the General Education Provisions Act, relating to the contingent extension of applicable programs, shall not apply to the Indochina Refugee Children Assistance Act of 1976, or to any program of financial assistance for educational purpose for Indochinese refugee children.

The amount appropriated for each additional year shall not exceed the amount which the Congress could, under the terms of the law for which the appropriation is made, have appropriated for such program during such terminal year.

(b)(1) For the purposes of clause (A) of subsection (a), the Congress shall not have been deemed to have passed legislation unless such legislation becomes law.

(2) In any case where the Commissioner is required under an applicable statute to carry out certain acts or make certain determinations which are necessary for the continuation of an applicable program, if such acts or determinations are required during the terminal year of such program, such acts and determinations shall be required during any fiscal year in which that part of subsection (a) which follows clause (B) thereof is in operation.

(20 U.S.C. 1226a) Enacted August 21, 1974, P.L. 93-380, sec. 506(a)(2), 88 Stat. 563; amended October 3, 1980, P.L. 96-374, sec. 1301, 94 Stat. 1496; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Oct. 3, 1980, P.L. 96-374, sec. 1301, 94 Stat. 1496.

PAYMENTS

Sec. 415. Payments pursuant to grants or contracts under any applicable program may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Commissioner may determine.

(20 U.S.C. 1226a-1) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 170; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; redesignated Nov. 1, 1978, P.L. 95-561, sec. 1231(a)(1), 92 Stat. 2342; amended by general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

Subpart 2—Planning and Evaluation of Federal Education Activities

PROGRAM PLANNING AND EVALUATION

Sec. 416. Sums appropriated pursuant to section 400(d) may include for any fiscal year for which appropriations are otherwise authorized under any applicable program not to exceed $25,000,000 which shall be available to the Secretary, in accordance with regulations prescribed by him, for expenses, including grants, contracts, or other payments, for (1) planning for the succeeding year for any such program, and (2) evaluation of such programs.

(20 U.S.C. 1226b) Enacted August 21, 1974, P.L. 93-380, sec. 506(a)(3)(C), 88 Stat. 563, 564.

ANNUAL EVALUATION REPORTS

Sec. 417. (a) Not later than December 31 of each year, the Secretary shall transmit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate an annual evaluation report which evaluates the effectiveness of applicable programs (including compliance with provisions of law requiring the maintenance of non-Federal expenditures for the purposes of such applicable programs) in achieving their legislated purposes together with recommendations relating to such programs for the improvement of such programs which will result in greater effectiveness in achieving such purposes. In the case of any evaluation report evaluating specific programs and projects, such report shall—

(A) set forth goals and specific objectives in qualitative and quantitative terms for all programs and projects assisted under the applicable program concerned and relate those goals and objectives to the purposes of such program;

(B) contain information on the progress being made during the previous fiscal year toward the achievement of such goals and objectives;

(C) describe the cost and benefits of the applicable program being evaluated during the previous fiscal year and identify which sectors of the public receive the benefits of such program and bear the costs of such program;

(D) contain plans for implementing corrective action and recommendations for new or amended legislation where warranted;

(E) contain a listing identifying the principal analyses and studies supporting the major conclusions and recommendations in the report; and

(F) be prepared in concise summary form with necessary detailed data and appendices, including tabulations of available data to indicate the effectiveness of the programs and projects by the sex, race, and age of its beneficiaries.

(2)[1] Repealed.

(b) Each evaluation report submitted pursuant to subsection (a) shall contain: (1) a brief description of each contract or grant for evaluation of any program (whether or not such contract or grant was made under section 416) any part of the performance of which occurred during the preceding year, (2) the name of the firm or individual who is to carry out the evaluation, and (3) the amount to be paid under the contract or grant.

(20 U.S.C. 1226c) Enacted August 21, 1974, P.L. 93-380, sec. 506(a)(3)(C), 88 Stat. 564; amended Nov. 1, 1978, P.L. 95-561, sec. 1246(a), (b), 92 Stat. 2354; amended Aug. 6, 1979, P.L. 96-46, sec. 4(b), 93 Stat. 342 (effective Oct. 1, 1978); amended October 3, 1980, P.L. 96-374, sec. 1305, 94 Stat. 1497; amended October 19, 1984, P.L. 98-511, sec. 705, 98 Stat. 2406.

RENEWAL EVALUATION REPORTS

SEC. 418. [Repealed by section 106(a) of the Congressional Reports Elimination Act of 1980.]

EVALUATION BY THE COMPTROLLER GENERAL

SEC. 419. (a) The Comptroller General of the United States shall review, audit, and evaluate any Federal education program upon request by a committee of the Congress having jurisdiction of the statute authorizing such program or, to the extent personnel are available, upon request by a member of such committee. Upon such request, he shall (1) conduct studies of statutes and regulations governing such program; (2) review the policies and practices of Federal agencies administering such program; (3) review the evaluation procedures adopted by such agencies carrying out such program; and (4) evaluate particular projects or programs. The Comptroller General shall compile such data as are necessary to carry out the preceding functions and shall report to the Congress at such times as he deems appropriate his findings with respect to such program and his recommendations for such modifications in existing laws, regulations, procedures and practices as will in his judgment best serve to carry out effectively and without duplication the policies set forth in education legislation relative to such program.

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[1] Paragraph (2) of section 417(a) was repealed Aug. 6, 1979, P.L. 96-46, sec. 4(b), 93 Stat. 342 (effective Oct. 1, 1978).

(b) In carrying out his responsibilities as provided in subsection (a), the Comptroller General shall give particular attention to the practice of Federal agencies of contracting with private firms, organizations, and individuals for the provision of a wide range of studies and services (such as personnel recruitment and training, program evaluation, and program administration) with respect to Federal education programs, and shall report to the heads of the agencies concerned and to the Congress his findings with respect to the necessity for such contracts and their effectiveness in serving the objectives established in education legislation.

(c) In addition to the sums authorized to be appropriated under section 400(d), there are authorized to be appropriated such sums as may be necessary to carry out the purposes of this section.

(20 U.S.C. 1227) Enacted June 23, 1972, P.L. 92-318, sec. 304, 86 Stat. 333; amended Aug. 21, 1974, P.L. 93-380, sec. 506(a)(3)(A) and (B), 88 Stat. 563.

PROHIBITION AGAINST USE OF APPROPRIATED FUNDS FOR BUSING

SEC. 420. No funds appropriated for the purpose of carrying out any applicable program may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system, except for funds appropriated pursuant to title I of the Act of September 30, 1950 (Public Law 874, 81st Congress), but not including any portion of such funds as are attributable to children counted under subparagraph (C) of section 3(d)(2) or section 403(1)(C) of that Act.

(20 U.S.C. 1228) Enacted August 21, 1974, P.L. 93-380, sec. 252, 88 Stat. 519.

PART C—GENERAL REQUIREMENTS AND CONDITIONS CONCERNING THE OPERATION AND ADMINISTRATION OF EDUCATION PROGRAMS; GENERAL AUTHORITY OF THE COMMISSIONER OF EDUCATION

APPLICABILITY

SEC. 421. The provisions of this part (except as otherwise provided) shall apply to any program for which the Commissioner has administrative responsibility, as specified by law or by delegation of authority pursuant to law.

(20 U.S.C. 1230) Enacted August 21, 1974, P.L. 93-380, sec. 507(a), 88 Stat. 565; amended October 12, 1976, P.L. 94-482, sec. 404(a), 90 Stat. 2230; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

SUBPART 1—GENERAL AUTHORITY

ADMINISTRATION OF EDUCATION PROGRAMS

SEC. 421A. (a) The Commissioner is authorized to delegate any of his functions under any applicable program, except the making of regulations and the approval of State plans, to any officer or employee of the Office of Education.

(b) In administering any applicable program, the Commissioner is authorized to utilize the services and facilities of any agency of the Federal Government and of any other public or nonprofit agency or institution in accordance with appropriate agreements, and to pay for such services either in advance or by way of reimbursement, as may be agreed upon.

(c)[1] (1)(A) Except in the case of a law which—

(i) authorizes appropriations for carrying out, or controls the administration of, an applicable program, or

(ii) is enacted in express limitation of the provisions of this paragraph,

no provision of any law shall be construed to authorize the consolidation of any applicable program with any other program. Where the provisions of law governing the administration of an applicable program permit the packaging or consolidation of applications for grants or contracts to attain simplicity or effectiveness of administration, nothing in this subparagraph shall be deemed to interfere with such packaging or consolidation.

(B) No provision of any law which authorizes an appropriation for carrying out, or controls the administration of, an applicable program shall be construed to authorize the consolidation of any such program with any other program unless provision for such a consolidation is expressly made thereby.

(C) For the purposes of this subsection, the term "consolidation" means any agreement, arrangement, or the other procedure which results in—

(i) the commingling of funds derived from one appropriation with those derived from another appropriation,

(ii) the transfer of funds derived from an appropriation to the use of an activity not authorized by the law authorizing such appropriation,

(iii) the use of practices or procedures which have the effect of requiring, or providing for, the approval of an application for funds derived from different appropriations according to any criteria other than those for which provision is made (either expressly or implicitly) in the law which authorizes the appropriation of such funds, or this title, or

(iv) as a matter of policy the making of a grant or contract involving the use of funds derived from one appropriation dependent upon the receipt of a grant or contract involving the use of funds derived from another appropriation.

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[1] Section 302(c) of P.L. 92-318 provides as follows:

"(c) The provisions of section 421(c) of the General Education Provisions Act shall be effective upon the date of enactment of this Act. No provision of any law which is inconsistent with such section 421(c) shall be effective nor shall any such provision control to the extent of such inconsistency, unless such a law is enacted after the date of enactment of this Act."

(2)(A) No requirement or condition imposed by a law authorizing appropriations for carrying out any applicable program, or controlling the administration thereof, shall be waived or modified, unless such a waiver or modification is expressly authorized by such law or by a provision of this title or by a law expressly limiting the applicability of this paragraph.

(B) There shall be no limitation on the use of funds appropriated to carry out any applicable program other than limitations imposed by the law authorizing the appropriation or a law controlling the administration of such program; nor shall any funds appropriated to carry out an applicable program be allotted, apportioned, allocated, or otherwise distributed in any manner or by any method different from that specified in the law authorizing the appropriation.

(3) No person holding office in the executive branch of the Government shall exercise any authority which would authorize or effect any activity prohibited by paragraph (1) or (2).

(4) The transfer of any responsibility, authority, power, duty, or obligation subject to this title, from the Commissioner to any other officer in the executive branch of the Government, shall not affect the applicability of this title with respect to any applicable program.

(20 U.S.C. 1231) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 166; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 321; amended June 23, 1972, P.L. 92-318, sec. 302(a), 86 Stat. 332, 333; heading of sec. 421 redesignated June 23, 1972, P.L. 92-318, sec. 302(b), 86 Stat. 333; redesignated August 21, 1974, P.L. 93-380, sec. 507(a), 88 Stat. 565; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

COLLECTION AND DISSEMINATION OF INFORMATION

SEC. 422. (a) The Commissioner shall—

(1) prepare and disseminate to State and local educational agencies and institutions information concerning applicable programs and cooperate with other Federal officials who administer programs affecting education in disseminating information concerning such programs;

(2) inform the public on federally supported education programs;

(3) collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving their purposes; and

(4) prepare and publish an annual report (to be referred to as "the Commissioner's annual report") on (A) the condition of education in the Nation, (B) developments in the administration, utilization, and impact of applicable programs, (C) results of investigations and activities by the Office of Education, and (D) such facts and recommendations as will serve the purpose for which the Office of Education is established (as set forth in section 403 of this Act).

(b) The Commissioner's annual report shall be submitted to the Congress not later than June 30 of each calendar year. The Commissioner's annual report shall be made available to State and local educational agencies and other appropriate agencies and institutions and to the general public.

(c) The Commissioner is authorized to enter into contracts with public or private agencies, organizations, groups, or individuals to carry out the provisions of this section.

(20 U.S.C. 1231a) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 166; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended June 23, 1972, P.L. 92-318, sec. 301(b)(2)(B), 86 Stat. 332; amended October 12, 1976, P.L. 94-482, sec. 409(b), 90 Stat. 2233; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

CATALOG OF FEDERAL EDUCATION ASSISTANCE PROGRAMS

Sec. 423. The Commissioner shall prepare and make available in such form as he deems appropriate a catalog of all Federal education assistance programs whether or not such programs are administered by him. The catalog shall—

(1) identify each such program, and include the name of the program, the authorizing statute, the specific Federal administering officials, and a brief description of such program;

(2) set forth the availability of benefits and eligibility restrictions in each such program;

(3) set forth the budget requests for each such program, past appropriations, obligations incurred, and pertinent financial information indicating (A) the size of each such program for selected fiscal years, and (B) any funds remaining available;

(4) set forth the prerequisites, including the cost to the recipient of receiving assistance under each such program, and any duties required of the recipient after receiving benefits;

(5) identify appropriate officials, in Washington, District of Columbia, as well as in each State and locality (if applicable), to whom application or reference for information for each such program may be made;

(6) set forth the application procedures;

(7) contain a detailed index designed to assist the potential beneficiary in identifying all education assistance programs related to a particular need or category of potential beneficiaries;

(8) contain such other program information and data as the Commissioner deems necessary or desirable in order to assist the potential program beneficiary to understand and take advantage of each Federal education assistance program; and

(9) be transmitted to Congress with the Commissioner's annual report.

(20 U.S.C. 1231b) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 167; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

COMPILATION OF ASSISTED INNOVATIVE PROJECTS

Sec. 424. The Assistant Secretary shall publish annually a compilation of all innovative projects assisted under programs administered in the Education Division, including title III and part C of title IV of the Elementary and Secondary Education Act of 1965, in any year funds are used to carry out such programs. Such compilation shall be indexed according to subject, descriptive terms, and locations.

(20 U.S.C. 1231b-1) Enacted August 21, 1974, P.L. 93-380, sec. 508(a), 88 Stat. 565, 566; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

REVIEW OF APPLICATIONS

SEC. 425. (a) In the case of any applicable program under which financial assistance is provided to (or through) a State educational agency to be expended in accordance with a State plan approved by the Commissioner, and in the case of the program provided for in title I of the Elementary and Secondary Education Act of 1965, any applicant or recipient aggrieved by the final action of the State educational agency, and alleging a violation of State or Federal law, rules, regulations, or guidelines governing the applicable program, in (1) disapproving or failing to approve its application or program in whole or part, (2) failing to provide funds in amounts in accord with the requirements of laws and regulations, (3) ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds, or (4) terminating further assistance for an approved program, may within thirty days request a hearing. Within thirty days after it receives such a request, the State educational agency shall hold a hearing on the record and shall review such final action. No later than ten days after the hearing the State educational agency shall issue its written ruling, including reasons therefor. If it determines such final action was contrary to Federal or State law, or the rules, regulations, and guidelines, governing such applicable program it shall rescind such final action.

(b) Any applicant or recipient aggrieved by the failure of a State educational agency to rescind its final action after a review under such subsection (a) may appeal such action to the Commissioner. An appeal under this subsection may be taken only if notice of such appeal is filed with the Commissioner within twenty days after the applicant or recipient has been notified by the State educational agency of the results of its review under subsection (a). If, on such appeal, the Commissioner determines the final action of the State educational agency was contrary to Federal law, or the rules, regulations, and guidelines governing the applicable program, he shall issue an order to the State educational agency prescribing appropriate action to be taken by such agency. On such appeal, findings of fact of the State educational agency, if supported by substantial evidence, shall be final. The Commissioner may also issue such interim orders to State educational agencies as he may deem necessary and appropriate pending appeal or review.

(c) Each State educational agency shall make available at reasonable times and places to each applicant or recipient under a program to which this section applies all records of such agency pertaining to any review or appeal such applicant or recipient is conducting under this section, including records of other applicants.

(d) If any State educational agency fails or refuses to comply with any provision of this section, or with any order of the Commissioner under subsection (b), the Commissioner shall forthwith terminate all assistance to the State educational agency under the applicable program affected.

(20 U.S.C. 1231b-2) Enacted August 21, 1974, P.L. 93-380, sec. 508(a), 88 Stat. 566; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

TECHNICAL ASSISTANCE

SEC. 426. (a) For the purpose of carrying out more effectively Federal education programs, the Commissioner is authorized, upon request, to provide advice, counsel, and technical assistance to State educational agencies, institutions of higher education, and, with the approval of the appropriate State educational agency, elementary and secondary schools—

(1) in determining benefits available to them under Federal law;

(2) in preparing applications for, and meeting requirements of applicable programs;

(3) in order to enhance the quality, increase the depth, or broaden the scope of activities under applicable programs; and

(4) in order to encourage simplification of applications, reports, evaluations, and other administrative procedures.

(b) The Commissioner shall permit local educational agencies to use organized and systematic approaches in determining cost allocation, collection, measurement, and reporting under any applicable program, if he determines (1) that the use of such approaches will not in any manner lessen the effectiveness and impact of such program in achieving purposes for which it is intended, (2) that the agency will use such procedures as will insure adequate evaluation of each of the programs involved, and (3) that such approaches are consistent with criteria prescribed by the Comptroller General of the United States for the purposes of audit. For the purpose of this subsection a cost is allocable to a particular cost objective to the extent of relative benefits received by such objective.

(c) In awarding contracts and grants for the development of curricula or instructional materials, the Commissioner and the Director of the National Institute of Education shall—

(1) encourage applicants to assure that such curricula or instructional materials will be developed in a manner conducive to dissemination through continuing consultations with publishers, personnel of State and local educational agencies, teachers, administrators, community representatives, and other individuals experienced in such dissemination;

(2) permit applicants to include provision for reasonable consultation fees or planning costs; and

(3) insure that grants to public agencies and nonprofit private organizations and contracts with public agencies and private organizations for publication and dissemination of curricula or instructional materials, or both, are awarded competitively to such agencies and organizations which provide assurances that the curricula and instructional materials will reach the target populations for which they were developed.

(d) The Commissioner's annual report shall contain a statement of the Commissioner's activities under this section.

(20 U.S.C. 1231c) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 167; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; redesignated August 21, 1974, P.L. 93-380, sec. 508(a), 88 Stat. 565; amended Nov. 1, 1978, P.L. 95-561, sec. 1248, 92 Stat. 2354, 2355; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

EQUALIZATION ASSISTANCE

SEC. 426A. (a) The Commissioner is authorized from the sums appropriated pursuant to subsection (d) to make grants to States to assist in developing and implementing plans to revise their systems of financing elementary and secondary education in order to achieve a greater equalization of resources among school districts. Any State desiring to receive such a grant shall (1) submit an application approved by the State legislature for such funds, (2) provide that State funds will match the Federal funds on a dollar for dollar basis, and (3) show how these efforts build upon the knowledge gained through the plans developed pursuant to section 842 of the Education Amendments of 1974.

(b) The Commissioner is authorized, from sums appropriated pursuant to subsection (d), (1) to develop and disseminate models and materials useful to the States in planning and implementing revisions of their school financing systems, and (2) to establish temporary national and regional training centers to assist those involved in school finance in providing the level of expertise needed by the States in revising their financing systems.

(c) The Commissioner shall (1) designate a unit within the Office of Education to serve as a national dissemination center for information on the States' efforts to achieve a greater equalization of resources for elementary and secondary education, and (2) develop an analysis of what has been learned through the use of funds available under section 842 of the Education Amendments of 1974 and disseminate the results of this analysis.

(d) There are hereby authorized to be appropriated $4,000,000 for each of the fiscal years ending prior to September 30, 1983, for the purposes of this section.

(20 U.S.C. 1231c-1) Enacted Nov. 1, 1978, P.L. 95-561, sec. 1202, 92 Stat. 2334; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

PARENTAL INVOLVEMENT AND DISSEMINATION

SEC. 427. In the case of any applicable program in which the Commissioner determines that parental participation at the State or local level would increase the effectiveness of the program in achieving its purposes, he shall promulgate regulations with respect to such program setting forth criteria designed to encourage such participation. If the program for which such determination provides for payments to local educational agencies, applications for such payments shall—

(1) set forth such policies and procedures as will ensure that programs and projects assisted under the application have been planned and developed, and will be operated, in consultation with, and with the involvement of parents of, the children to be served by such programs and projects;

(2) be submitted with assurance that such parents have had an opportunity to present their views with respect to the application; and

(3) set forth policies and procedures for adequate dissemination of program plans and evaluations to such parents and the public.

(20 U.S.C. 1231d) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 168; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; redesignated August 21, 1974, P.L. 93-380, sec. 508(a), 88 Stat. 565; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

USE OF FUNDS WITHHELD FOR FAILURE TO COMPLY WITH OTHER PROVISIONS OF FEDERAL LAW

Sec. 428. At any time that the Commissioner establishes an entitlement, or makes an allotment, or reallotment to any State, under any applicable program, he shall reduce such entitlement, allotment, or reallotment by such amount as he determines it would have been reduced, had the data on which the entitlement, allotment, or reallotment is based excluded all data relating to local educational agencies of the State which on the date of the Commissioner's action are ineligible to receive the Federal financial assistance involved because of a failure to comply with title VI of the Civil Rights Act of 1964. Any appropriated funds which will not be paid to a State as a result of the preceding sentence may be used by the Commissioner for grants to local educational agencies of that State in accordance with section 405 of the Civil Rights Act of 1964.

(20 U.S.C. 1231e) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 168; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; redesignated August 21, 1974, P.L. 93-380, sec. 508(a), 88 Stat. 565; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

AUTHORIZATION TO FURNISH INFORMATION

Sec. 429. The Commissioner is authorized to transfer transcripts or copies of other records of the Office of Education to State and local officials, public and private organizations, and individuals.

(20 U.S.C. 1231f) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 168; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 93-380, sec. 501(b), 88 Stat. 558; redesignated August 21, 1974, P.L. 93-380, sec. 508(a), 88 Stat. 565; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

Subpart 2—Administration: Requirements and Limitations

APPLICATIONS

Sec. 430. (a) Notwithstanding any other provision of law, unless expressly in limitation of the provisions of this section, the Commissioner is authorized to provide for the submission of applications for assistance effective for three fiscal years under any applicable program with whatever amendments to such applications being required as the Commissioner determines essential.

(b) The Commissioner shall, insofar as is practicable, establish uniform dates during the year for the submission of applications under all applicable programs and for the approval of such applications.

(c) The Commissioner shall, insofar as is practicable, develop and require the use of—

(1) a common application for grants to local educational agencies in applicable programs administered by State educational agencies in which the funds are distributed to such local

agencies pursuant to some objective formula, and such application shall be used as the single application for as many of these programs as is practicable;

(2) a common application for grants to local educational agencies in applicable programs administered by State educational agencies in which the funds are distributed to such local agencies on a competitive or discretionary basis, and such application shall be used as the single application for as many of such programs as is practicable; and

(3) a common application for grants to local educational agencies in applicable programs which are directly administered by the Commissioner, and such application shall be used as the single application for as many of these programs as is practicable.

(20 U.S.C. 1231g) Enacted Nov. 1, 1978, P.L. 95-561, sec. 1213, 92 Stat. 2342; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

REGULATIONS: REQUIREMENTS AND ENFORCEMENT

SEC. 431. (a)(1) For the purpose of this section, the term "regulation" means any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the Commissioner.

(2) Regulations issued by the Department of Health, Education, and Welfare or the Office of Education, or by any official of such agencies, in connection with, or affecting, the administration of any applicable program shall contain immediately following each substantive provision of such regulations, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based.

(b)(1) No proposed regulation prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

(2)(A) During the thirty-day period prior to the date upon which such regulation is to be effective, the Commissioner shall, in accordance with the provisions of section 553, of title 5, United States Code, offer any interested party an opportunity to make comment upon, and take exception to, such standard, rule, regulation, or general requirement and shall reconsider any such standard, rule, regulation, or general requirement upon which comment is made or to which exception is taken.

(B) If the Commissioner determines that the thirty-day requirement in paragraph (1) will cause undue delay in the implementation of a regulation, thereby causing extreme hardship for the intended beneficiaries of an applicable program, he shall notify the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate. If neither committee disagrees with the determination of the Commissioner within 10 days after such notice, the Commissioner may waive such requirement with respect to such regulation.

(c) All such regulations shall be uniformly applied and enforced throughout the fifty States.

(d)(1) Concurrently with the publication in the Federal Register of any final regulation (except expected family contribution schedules and any amendments thereto promulgated pursuant to sections 428(a)(2) (D) and (E) and 482(a) (1) and (2) of the Higher Education Act of 1965) of general applicability as required in subsection (b) of this section, such final regulation shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such final regulation shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation, in whole or in part. Failure of the Congress to adopt such a concurrent resolution with respect to any such final regulation prescribed under any such Act, shall not represent, with respect to such final regulation, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.

(2) The forty-five day period specified in paragraph (1) shall be deemed to run without interruption except during periods when either House is in adjournment sine die, in adjournment subject to the call of the Chair, or in adjournment to a day certain for a period of more than four consecutive days. In any such period of adjournment, the forty-five days shall continue to run, but if such period of adjournment is thirty calendar days, or less, the forty-five day period shall not be deemed to have elapsed earlier than ten days after the end of such adjournment. In any period of adjournment which lasts more than thirty days, the forty-five day period shall be deemed to have elapsed after thirty calendar days has elapsed, unless, during those thirty calendar days, either the Committee on Education and Labor of the House of Representatives, or the Committee on Labor and Human Resources of the Senate, or both, shall have directed its chairman, in accordance with said committee's rules, and the rules of that House, to transmit to the appropriate department or agency head a formal statement of objection to the final regulation. Such letter shall suspend the effective date of the final regulation until not less than twenty days after the end of such adjournment, during which the Congress may enact the concurrent resolution provided for in this subsection. In no event shall the final regulation go into effect until the forty-five day period shall have elapsed, as provided for in this subsection, for both Houses of the Congress.[1]

(e) Whenever a concurrent resolution of disapproval is enacted by the Congress under the provisions of this section, the agency which issued such regulation may thereafter issue a modified regulation to govern the same or substantially identical circumstances, but shall, in publishing such modification in the Federal Register and submitting it to the Speaker of the House of Representatives and the President of the Senate, indicate how the modification differs from the final regulation earlier disapproved, and how the agency believes the modification disposes of the findings by the Congress in the concurrent resolution of disapproval.

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[1] Section 5(b) of P.L. 94-43 (The Emergency Technical Provisions Act) provides that "Subsections (b) and (d) of Section 431 of the General Education Provisions Act shall not operate to delay the effectiveness of regulations issued by the Commissioner of Education to implement the provisions of this Act."

(f) For the purposes of subsections (d) and (e) of this section, activities under sections 404, 405, and 406 of this title, and under title IX of the Education Amendments of 1972 shall be deemed to be applicable programs.

(g) Not later than sixty days after the enactment of any part of any Act affecting the administration of any applicable program, the Commissioner shall submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate a schedule in accordance with which the Commissioner has planned to promulgate final regulations implementing such Act or part of such Act. Such schedule shall provide that all such final regulations shall be promulgated within one hundred and eighty days after the submission of such schedule. Except as is provided in the following sentence, all such final regulations shall be promulgated in accordance with such schedule. If the Commissioner finds that, due to circumstances unforeseen at the time of the submission of any such schedule, he cannot comply with a schedule submitted pursuant to this subsection, he shall notify such committees of such findings and submit a new schedule. If both such committees notify the Commissioner of their approval of such new schedule, such final regulations shall be promulgated in accordance with such new schedule.

(20 U.S.C. 1232) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 169; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 93-380, sec. 509(a), 88 Stat. 566, 568; amended November 29, 1975, P.L. 94-142, sec. 7, 89 Stat. 796; amended October 12, 1976, P.L. 94-482, sec. 405, 90 Stat. 2231; amended Oct. 3, 1980, P.L. 96-374, sec. 1302, 94 Stat. 1497; amended August 13, 1981, P.L. 97-35, sec. 533(a)(3), 95 Stat. 453; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Oct. 3, 1980, P.L. 96-374, sec. 1302, 94 Stat. 1497; amended Aug. 13, 1981, P.L. 97-35, sec. 533(a)(3), 95 Stat. 453.

MAINTENANCE OF EFFORT DETERMINATION

SEC. 431A. [Repealed by P.L. 98-511, sec. 109, 98 Stat. 2369.]

PROHIBITION AGAINST FEDERAL CONTROL OF EDUCATION

SEC. 432. No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

(20 U.S.C. 1232a) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 169; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended June 23, 1972, P.L. 92-318, sec. 717(b), 86 Stat. 369; amended October 12, 1976, P.L. 94-482, sec. 404(b), 90 Stat. 2230.

LABOR STANDARDS

SEC. 433. Except for emergency relief under section 7 of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. 276a—276a-5). The Secretary of Labor shall have, with respect to the labor standards specified in this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 and section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c).

(20 U.S.C. 1232b) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 169; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326.

Subpart 3—Administration of Education Programs and Projects by States and Local Educational Agencies

STATE EDUCATIONAL AGENCY MONITORING AND ENFORCEMENT

SEC. 434. (a) In the case of any applicable program in which Federal funds are made available to local agencies in a State through or under the supervision of a State board or agency, the Commissioner may require the State to submit a plan for monitoring compliance by local agencies with Federal requirements under such program and for enforcement by the State of such requirements. The Commissioner may require such plan to provide—

(1) for periodic visits by State personnel of programs administered by local agencies to determine whether such programs are being conducted in accordance with such requirements;

(2) for periodic audits of expenditures under such programs by auditors of the State or other auditors not under the control, direction, or supervision of the local educational agency; and

(3) that the State investigate and resolve all complaints received by the State, or referred to the State by the Commissioner relating to the administration of such programs.

(b) In order to enforce the Federal requirements under any applicable program the State may—

(1) withhold approval, in whole or in part, of the application of a local agency for funds under the program until the State is satisfied that such requirements will be met; except that the State shall not finally disapprove such an application unless the State provides the local agency an opportunity for a hearing before an impartial hearing officer and such officer determines that there has been a substantial failure by the local agency to comply with any of such requirements;

(2) suspend payments to any local agency, in whole or in part, under the program if the State has reason to believe that the local agency has failed substantially to comply with any of such requirements, except that (A) the State shall not suspend such payments until fifteen days after the State provides the local agency an opportunity to show cause why such action should not be taken and (B) no such suspension shall continue in effect longer than sixty days unless the State within such period provides the notice for a hearing required under paragraph (3) of this subsection;

(3) withhold payments, in whole or in part, under any such program if the State finds, after reasonable notice and opportunity for a hearing before an impartial hearing officer, that the local agency has failed substantially to comply with any of such requirements.

Any withholding of payments under paragraph (3) of this subsection shall continue until the State is satisfied that there is no longer a failure to comply substantially with any of such requirements.

(20 U.S.C. 1232c) Enacted Apr. 13, 1970, P.L. 91-230, sec. 401(a), 84 Stat. 169; redesignated June 23, 1972, P.L. 92-318, secs. 301(a)(1), 501, 86 Stat. 326, 345; amended Aug. 24, 1974, P.L. 93-380, sec. 510, 88 Stat. 568, 571; amended Oct. 12, 1976, P.L. 94-482, sec. 501(f)(1), 90 Stat. 2237; redesignated and amended Nov. 1, 1978, P.L. 95-561, sec. 1231(a)(3), 92 Stat. 2342, 2343; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

SINGLE STATE APPLICATION

SEC. 435. (a) In the case of any State which applies, contracts, or submits a plan, for participation in any applicable program in which Federal funds are made available for assistance to local educational agencies through, or under the supervision of, the State educational agency of that State, such State shall submit (subject, in the case of programs under chapter 1 and chapter 2 of title I of the Elementary and Secondary Education Act of 1965, to the provisions of title V of such Act) to the Commissioner a general application containing the assurances set forth in subsection (b). Such application may be submitted jointly for all programs covered by the application, or it may be submitted separately for each such program or for groups of programs. Each application submitted under this section must be approved by each official, agency, board, or other entity within the State which, under State law, is primarily responsible for supervision of the activities conducted under each program covered by the application.

(b) An application submitted under subsection (a) shall set forth assurances, satisfactory to the Commissioner—

(1) that each program will be administered in accordance with all applicable statutes, regulations, program plans, and applications;

(2) that the control of funds provided under each program and title to property acquired with program funds will be in a public agency, or in a nonprofit private agency, institution, or organization if the statute authorizing the program provides for grants to such entities, and that the public agency or nonprofit private agency, institution, or organization will administer such funds and property;

(3) that the State will adopt and use proper methods of administering each applicable program, including—

(A) monitoring of agencies, institutions, and organizations responsible for carrying out each program, and the enforcement of any obligations imposed on those agencies, institutions, and organizations under law,

(B) providing technical assistance, where necessary, to such agencies, institutions, and organizations,

(C) encouraging the adoption of promising or innovative educational techniques by such agencies, institutions, and organizations,

(D) the dissemination throughout the State of information on program requirements and successful practices, and

(E) the correction of deficiencies in program operations that are identified through monitoring or evaluation;

(4) that the State will evaluate the effectiveness of covered programs in meeting their statutory objectives, at such intervals (not less often than once every three years) and in accordance with such procedures as the Commissioner may prescribe by regulation, and that the State will cooperate in carrying out any evaluation of each program conducted by or for the Secretary or other Federal official;

(5) that the State will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to the State under each program;

(6) that the State will make reports to the Commissioner (including reports on the results of evaluations required under paragraph (4)) as may reasonably be necessary to enable the Commissioner to perform his duties under each program, and that the State will maintain such records, in accordance with the requirements of section 437 of this Act, and afford access to the records as the Commissioner may find necessary to carry out his duties;

(7) that the State will provide reasonable opportunities for the participation by local agencies, representatives of the class of individuals affected by each program and other interested institutions, organizations, and individuals in the planning for and operation of each program, including the following:

(A) the State will consult with relevant advisory committees, local agencies, interest groups, and experienced professionals in the development of program plans required by statute;

(B) the State will publish each proposed plan, in a manner that will ensure circulation throughout the State, at least sixty days prior to the date on which the plan is submitted to the Commissioner or on which the plan becomes effective, whichever occurs earlier, with an opportunity for public comments on such plan to be accepted for at least thirty days;

(C) the State will hold public hearings on the proposed plans if required by the Commissioner by regulation; and

(D) the State will provide an opportunity for interested agencies, organizations, and individuals to suggest improvements in the administration of the program and to allege that there has been a failure by any entity to comply with applicable statutes and regulations; and

(8) that none of the funds expended under any applicable program will be used to acquire equipment (including computer software) in any instance in which such acquisition results in a direct financial benefit to any organization representing

the interests of the purchasing entity or its employees or any affiliate of such an organization.

(c) Each general application submitted under this section shall remain in effect for the duration of any program it covers. The Commissioner shall not require the resubmission or amendment of that application unless required by changes in Federal or State law or by other significant changes in the circumstances affecting an assurance in that application.

(20 U.S.C. 1232d) Enacted Nov. 1, 1978, P.L. 95-561, sec. 1231(a)(3), 92 Stat. 2343-2345 (former sec. 435 redesignated as sec. 415). See also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Oct. 19, 1984, P.L. 98-511, sec. 706(a), 98 Stat. 2406; amended April 28, 1988, P.L. 100-297, sec. 3501(c), 102 Stat. 357.

SINGLE LOCAL EDUCATIONAL AGENCY APPLICATION

Sec. 436. (a) Each local educational agency which participates in an applicable program under which Federal funds are made available to such agency through a State agency or board shall submit to such agency or board a general application containing the assurances set forth in subsection (b). That application shall cover the participation by that local education agency in all such programs.

(b) The general application submitted by a local educational agency under subsection (a) shall set forth assurances—

(1) that the local educational agency will administer each program covered by the application in accordance with all applicable statutes, regulations, program plans, and applications;

(2) that the control of funds provided to the local educational agency under each program and title to property acquired with those funds, will be in a public agency and that a public agency will administer those funds and property;

(3) that the local educational agency will use fiscal control and fund accounting procedures that will ensure proper disbursement of, and accounting for, Federal funds paid to that agency under each program;

(4) that the local educational agency will make reports to the State agency or board and to the Commissioner as may reasonably be necessary to enable the State agency or board and the Commissioner to perform their duties and that the local educational agency will maintain such records, including the records required under section 437, and provide access to those records, as the State agency or board or the Commissioner deem necessary to perform their duties;

(5) that the local educational agency will provide reasonable opportunities for the participation by teachers, parents, and other interested agencies, organizations, and individuals in the planning for and operation of each program;

(6) that any application, evaluation, periodic program plan or report relating to each program will be made readily available to parents and other members of the general public;

(7) that in the case of any project involving construction—

(A) the project is not inconsistent with overall State plans for the construction of school facilities, and

(B) in developing plans for construction, due consideration will be given to excellence of architecture and design and to compliance with standards prescribed by the Secretary under section 504 of the Rehabilitation Act of 1973 in order to ensure that facilities constructed with the use of Federal funds are accessible to and usable by handicapped individuals;

(8) that the local educational agency has adopted effective procedures for acquiring and disseminating to teachers and administrators participating in each program significant information from educational research, demonstrations, and similar projects, and for adopting, where appropriate, promising educational practices developed through such projects; and

(9) that none of the funds expended under any applicable program will be used to acquire equipment (including computer software) in any instance in which such acquisition results in a direct financial benefit to any organization representing the interests of the purchasing entity or its employees or any affiliate of such an organization.

(c) A general application submitted under this section shall remain in effect for the duration of the programs it covers. The State agencies or boards administering the programs covered by the application shall not require the submission or amendment of such application unless required by changes in Federal or State law or by other significant change in the circumstances affecting an assurance in such application.

(20 U.S.C. 1232e) Enacted Apr. 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 170; redesignated June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended Nov. 1, 1978, P.L. 95-561, sec. 1231(a)(3), 92 Stat. 2345, 2346; amended Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Oct. 19, 1984, P.L. 98-511, sec. 706(b), 98 Stat. 2407.

Subpart 4—Records; Privacy; Limitation on Withholding Federal Funds

RECORDS

Sec. 437. (a) Each recipient of Federal funds under any applicable program through any grant, subgrant, contract, subcontract, loan, or other arrangement (other than procurement contracts awarded by an administrative head of an educational agency) shall keep records which fully disclose the amount and disposition by the recipient of those funds, the total cost of the activity for which the funds are used, the share of that cost provided from other sources, and such other records as will facilitate an effective audit. The recipient shall maintain such records for five years after the completion of the activity for which the funds are used.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit examination, to any records of a recipient which may be related, or pertinent to, the grants, subgrants, contracts, subcontracts, loans, or other arrangements to which reference is made in subsection (a), or which may relate to the compliance of the recipient with any requirement of an applicable program.

(20 U.S.C. 1232f) Enacted Nov. 1, 1978, P.L. 95-561, sec. 1231(c), 92 Stat. 2346 (former sec. 437 redesignated as sec. 406A).

PROTECTION OF THE RIGHTS AND PRIVACY OF PARENTS AND STUDENTS[1]

SEC. 438. (a)(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the educational records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (C), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(C) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (B), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purposes for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's educational records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials, which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1), the records and documents of such law enforcement unit which (I), are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5) (A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

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[1] This section may be cited as the "Family Educational Rights and Privacy Act of 1974".

(b)(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, (iii) an administrative head of an education agency (as defined in section 408(c)), or (iv) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of the Internal Revenue Code of 1954; and

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection.[1]

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, (C) an administrative head of an education agency or (D) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education program, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged

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[1] Apparent error. The word ", unless—" should probably appear in place of the period.

victim of any crime of violence (as that term is defined in section 26 of title 18, United States Code), the results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime with respect to such crime.

(c) The Secretary shall adopt appropriate regulations to protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) The Secretary, or an administrative head of an education agency, shall take appropriate actions to enforce provisions of this section and to deal with violations of this section, according to the provisions of this Act, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with the provisions of this section, and he has determined that compliance cannot be secured by voluntary means.

(g) The Secretary shall establish or designate an office and review board within the Department of Health, Education, and Welfare for the purpose of investigating, processing, reviewing, and adjudicating violations of the provisions of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(20 U.S.C. 1232g) Enacted August 21, 1974, P.L. 93-380, sec. 513(a), 88 Stat. 571, 574; amended December 31, 1974, P.L. 93-568, sec. 2, 88 Stat. 1858, 1860; amended Aug. 6, 1979, P.L. 96-46, sec. 4(c) 93 Stat. 342; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677; amended Nov. 8, 1990, P.L. 101-142, sec. 203, 104 Stat. 2385.

PROTECTION OF PUPIL RIGHTS

SEC. 439. (a) All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

(b) No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

(1) political affiliations;

(2) mental and psychological problems potentially embarrassing to the student or his family;

(3) sex behavior and attitudes;

(4) illegal, anti-social, self-incriminating and demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;

(6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

(7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

(20 U.S.C. 1232h) Enacted August 21, 1974, P.L. 93-380, sec. 514(a), 88 Stat. 574; amended Nov. 1, 1978, P.L. 95-561, sec. 1250, 92 Stat. 2355, 2356.

LIMITATION ON WITHHOLDING OF FEDERAL FUNDS

SEC. 440. (a) Except as provided in section 438(b)(1)(D) of this Act, the refusal of a State or local educational agency or institution of higher education, community college, school, agency offering a preschool program, or other educational institution to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance. Such a refusal shall also not constitute sufficient grounds for a denial of, a refusal to consider, or a delay in the consideration of, funding for such a recipient in succeeding fiscal years. In the case of any dispute arising under this section, reasonable notice and opportunity for a hearing shall be afforded the applicant.

(b) The extension of Federal financial assistance to a local educational agency may not be limited, deferred, or terminated by the Secretary on the ground of noncompliance with title VI of the Civil Rights Act of 1964 or any other nondiscrimination provision of Federal law unless such agency is accorded the right of due process of law, which shall include—

(1) at least 30 days prior written notice of deferral to the agency, setting forth the particular program or programs which the Secretary finds to be operated in noncompliance with a specific provision of Federal law;

(2) the opportunity for a hearing on the record before a duly appointed administrative law judge within a 60-day period (unless such period is extended by mutual consent of the Secre-

tary and such agency) from the commencement of any deferral;

(3) the conclusion of such hearing and the rendering of a decision on the merits by the administrative law judge within a period not to exceed 90 days from the commencement of such hearing, unless the judge finds by a decision that such hearing cannot be concluded or such decision cannot be rendered within such period, in which case such judge may extend such period for not to exceed 60 additional days;

(4) the limitation of any deferral of Federal financial assistance which may be imposed by the Secretary to a period not to exceed 15 days after the rendering of such decision unless there has been an express finding on such record that such agency has failed to comply with any such nondiscrimination provision of Federal law; and

(5) procedures, which shall be established by the Secretary, to ensure the availability of sufficient funds, without regard to any fiscal year limitations, to comply with the decision of such judge.

(c) It shall be unlawful for the Secretary to defer or limit any Federal financial assistance on the basis of any failure to comply with the imposition of quotas (or any other numerical requirements which have the effect of imposing quotas) on the student admission practices of an institution of higher education or community college receiving Federal financial assistance.

(20 U.S.C. 1232i) Enacted August 21, 1974, P.L. 93-380, sec. 515(a), 88 Stat. 574; amended October 12, 1976, P.L. 94-482, secs. 407, 408, 90 Stat. 2232, 2233.

PART D—ADVISORY COUNCILS

DEFINITIONS

SEC. 441. As used in this part, the term—

(1) "advisory council" means any committee, board, commission, council, or other similar group (A) established or organized pursuant to any applicable statute, or (B) established under the authority of section 442; but such term does not include State advisory councils or commissions established pursuant to any such statute;

(2) "statutory advisory council" means an advisory council established by, or pursuant to, statute to advise and make recommendations with respect to the administration or improvement of an applicable program or other related matter;

(3) "nonstatutory advisory council" means an advisory council which is (A) established under the authority of section 442, or (B) established to advise and make recommendations with respect to the approval of applications for grants or contracts as required by statute;

(4) "Presidential advisory council" means a statutory advisory council, the members of which are appointed by the President;

(5) "Secretarial advisory council" means a statutory advisory council, the members of which are appointed by the Secretary;

(6) "Commissioner's advisory council"[1] means a statutory advisory council, the members of which are appointed by the Commissioner;

(7) "applicable statute" means any statute (or title, part, or section thereof) which authorizes an applicable program or controls the administration of any such program.

(20 U.S.C. 1233) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 170; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

AUTHORIZATION FOR NECESSARY ADVISORY COUNCILS

SEC. 442. (a) The Commissioner is authorized to create, and appoint the members of, such advisory councils as he determines in writing to be necessary to advise him with respect to—

(1) the organization of the Office of Education and its conduct in the administration of applicable programs;

(2) recommendations for legislation regarding education programs and the means by which the educational needs of the Nation may be met; and

(3) special problems and areas of special interest in education.

(b) Each advisory council created under the authority of subsection (a) shall terminate not later than one year from the date of its creation unless the Commissioner determines in writing not more than thirty days prior to the expiration of such one year that its existence for an additional period, not to exceed one year, is necessary in order to complete the recommendations or reports for which it was created.

(c) The Commissioner shall include in his report submitted pursuant to section 448 a statement on all advisory councils created or extended under the authority of this section and their activities.

(20 U.S.C. 1233a) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 171; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

MEMBERSHIP AND REPORTS OF STATUTORY ADVISORY COUNCILS

SEC. 443. (a) Notwithstanding any other provision of law unless expressly in limitation of the provisions of this section, each statutory advisory council—

(1) shall be composed of the number of members provided by statute who may be appointed, without regard to the provisions of title 5, United States Code, governing appointment in the competitive service, and shall serve for terms of not to exceed three years, which in the case of initial members, shall be staggered; and

(2) shall make an annual report of its activities, findings and recommendations to the Congress not later than March 31 of each calendar year, which shall be submitted with the Commissioner's annual report.

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[1] References to the office, functions, etc. of the Commissioner of Education were, in effect, deleted by the Department of Education Reorganization Act, approved Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677, 690.

The Commissioner shall not serve as a member of any such advisory council.

(b) Members of Presidential advisory councils shall continue to serve, regardless of any other provision of law limiting their terms, until the President appoints other members to fill their positions.

(20 U.S.C. 1233b) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 171; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 93-380, sec. 516(a), 88 Stat. 575; amended October 12, 1976, P.L. 94-482, sec. 411, 90 Stat. 2234; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

COMPENSATION OF MEMBERS OF ADVISORY COUNCILS

SEC. 444. Members of all advisory councils to which this part is applicable who are not in the regular full-time employ of the United States shall, while attending meetings or conferences of the advisory council or otherwise engaged in the business of the advisory council, be entitled to receive compensation at a rate fixed by the Commissioner, but not exceeding the rate specified at the time of such service for grade GS-18 in section 5332 of title 5, United States Code, including traveltime, and while so serving on the business of the advisory council away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

(20 U.S.C. 1233c) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 171; renumbered June 23, 1972, P.L. 92-18, sec. 301(a)(1), 86 Stat. 326; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

PROFESSIONAL, TECHNICAL, AND CLERICAL STAFF; TECHNICAL ASSISTANCE

SEC. 445. (a) Presidential advisory councils are authorized to appoint, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, or otherwise obtain the services of, such professional, technical, and clerical personnel as may be necessary to enable them to carry out their functions, as prescribed by law.

(b) The Assistant Secretary shall engage such personnel and technical assistance as may be required to permit Secretarial and Assistant Secretary's advisory councils to carry out their function as prescribed by law.

(c) Subject to regulations of the Assistant Secretary, Presidential advisory councils are authorized to procure temporary and intermittent services of such personnel as are necessary to the extent authorized by section 3109 of title 5, United States Code, but at rates not to exceed the rate specified at the time of such service for grade GS-18 in section 5332 of such title.

(d) No employee of an advisory council, appointed and compensated pursuant to this section, shall be compensated at a rate in excess of that which such employee would receive if such employee were appointed subject to the appropriate provisions of title 5, United States Code, regarding appointments to, and compensation with respect to, the competitive service, except that—

(1) executive directors of Presidential advisory councils shall be compensated at the rate specified for employees placed in grade GS-18 of the General Schedule set forth in section 5332 of such title 5;

(2) executive directors of all other statutory advisory councils shall be compensated at the rate provided for employees in grade 15 of such General Schedule; and

(3) in accordance with regulations promulgated by the Assistant Secretary, other employees of advisory councils shall be compensated at such rates as may be necessary to enable such advisory councils to accomplish their purposes.

(20 U.S.C. 1233d) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 171; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 93-380, sec. 517(a), 88 Stat. 575; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

MEETINGS OF ADVISORY COUNCILS

SEC. 446. (a) Each statutory advisory council shall meet at the call of the chairman thereof but not less than two times each year. Nonstatutory advisory councils shall meet in accordance with regulations promulgated by the Commissioner.

(b) Minutes of each meeting of each advisory council shall be kept and shall contain a record of the persons present, a description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory council. The accuracy of all minutes shall be certified to by the chairman of the advisory council.

(20 U.S.C. 1233e) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 172; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

AUDITING AND REVIEW OF ADVISORY COUNCIL ACTIVITIES

SEC. 447. (a) Each statutory advisory council shall be subject to such general regulations as the Commissioner may promulgate respecting the governance of statutory advisory councils and shall keep such records of its activities as will fully disclose the disposition of any funds which may be at its disposal and the nature and extent of its activities in carrying out its functions.

(b) The Comptroller General of the United States, or any of his duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of each advisory council which is subject to the operation of this part.

(20 U.S.C. 1233f) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 172; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326; amended August 21, 1974, P.L. 92-380, sec. 517(b), 88 Stat. 575; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

REPORT BY THE COMMISSIONER OF EDUCATION

SEC. 448. (a) Not later than June 30 of each calendar year after 1970, the Commissioner shall submit, as a part of the Commissioner's annual report, a report on the activities of the advisory councils which are subject to this part to the Committee on Labor and

Human Resources of the Senate and the Committee on Education and Labor of the House of Representatives. Such report shall contain, at least, a list of all such advisory councils, the names and affiliations of their members, a description of the function of each advisory council, and a statement of the dates of the meetings of each such advisory council.

(b) If the Commissioner determines that a statutory advisory council is not needed or that the functions of two or more statutory advisory councils should be combined, he shall include in the report a recommendation that such advisory council be abolished or that such functions be combined. Unless there is an objection to such action by either the Senate or the House of Representatives within ninety days after the submission of such report, the Commissioner is authorized to abolish such advisory council or combine the functions of two or more advisory councils as recommended in such report.

(20 U.S.C. 1233g) Enacted April 13, 1970, P.L. 91-230, sec. 401(a)(10), 84 Stat. 172; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326, amended June 15, 1977, P.L. 95-43, sec. 1(d), 91 Stat. 219; see also general reference Oct. 17, 1979, P.L. 96-88, sec. 301, 93 Stat. 677.

RELATION TO OTHER LAWS

SEC. 449. (a) No provision of any law establishing, authorizing the establishment of, or controlling the operation of, an advisory council which is not consistent with the provisions of this part shall apply to any advisory council to which this part applies.

(b) The provisions of subsections (e) and (f) of section 10 of the Federal Advisory Committee Act shall not apply to Presidential advisory councils (as defined in section 441).

(20 U.S.C. 1233h) Enacted August 21, 1974, P.L. 93-380, sec. 518(a), 88 Stat. 575.

PART E—ENFORCEMENT[1]

SEC. 451. OFFICE OF ADMINISTRATIVE LAW JUDGES.

(a) The Secretary shall establish in the Department of Education an Office of Administrative Law Judges (hereinafter in this part referred to as the "Office") which shall conduct—

(1) recovery of funds hearings pursuant to section 452 of this Act,

(2) withholding hearings pursuant to section 455 of this Act,

(3) cease and desist hearings pursuant to section 456 of this Act, and

(4) other proceedings designated by the Secretary.

(b) The administrative law judges (hereinafter "judges") of the Office shall be appointed by the Secretary in accordance with section 3105 of title 5, United States Code.

(c) The judges shall be officers or employees of the Department. The judges shall meet the requirements imposed for administrative law judges pursuant to section 3105 of title 5, United States Code. In choosing among equally qualified candidates for such positions the Secretary shall give favorable consideration to the candidates' experience in State or local educational agencies and their knowledge of the workings of Federal education programs in such agencies. The Secretary shall designate one of the judges of the Office to be the chief judge.

(d) For the purposes of conducting hearings described in subsection (a), the chief judge shall assign a judge to each case or class of cases. A judge shall be disqualified in any case in which the judge has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the judge to be assigned to the case.

(e) The judge shall review and may require that evidence be taken on the sufficiency of the preliminary departmental determination as set forth in section 452.

(f)(1) The proceedings of the Office shall be conducted according to such rules as the Secretary shall prescribe by regulation in conformance with the rules relating to hearings in title 5, United States Code, sections 554, 556, and 557.

(2) The provisions of title 5, United States Code, section 504, relating to costs and fees of parties, shall apply to the proceedings before the Department.

(g)(1) In order to secure a fair, expeditious, and economical resolution of cases and where the judge determines that the discovered information is likely to elicit relevant information with respect to an issue in the case, is not sought primarily for the purposes of delay or harassment, and would serve the ends of justice, the judge may order a party to—

(A) produce relevant documents;

(B) answer written interrogatories that inquire into relevant matters; and

(C) have depositions taken.

The judge shall set a time limit of 90 days on the discovery period. The judge may extend this period for good cause shown. At the request of any party, the judge may establish a specific schedule for the conduct of discovery.

(2) In order to carry out the provisions of subsections (f)(1) and (g)(1), the judge is authorized to issue subpoenas and apply to the appropriate court of the United States for enforcement of a subpoena. The court may enforce the subpoena as if it pertained to a proceeding before that court.

(h) The Secretary shall establish a process for the voluntary mediation of disputes pending before the Office. The mediator shall be agreed to by all parties involved in mediation and shall be independent of the parties to the dispute. In the mediation of disputes the Secretary shall consider mitigating circumstances and proportion of harm pursuant to section 453. In accordance with rule 408 of the Federal Rules of Evidence, evidence of conduct or statements made in compromise negotiations shall not be admissible in proceedings before the Office. Mediation shall be limited to 120 days, except that the mediator may grant extensions of such period.

(i) The Secretary shall employ, assign, or transfer sufficient professional personnel, including judges of the Office, to ensure that all matters brought before the Office may be dealt with in a timely manner.

(20 U.S.C. 1234) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

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[1] P.L. 100-297 amended Part E to read as follows.

SEC. 452. RECOVERY OF FUNDS.

(a)(1) Whenever the Secretary determines that a recipient of a grant or cooperative agreement under an applicable program must return funds because the recipient has made an expenditure of funds that is not allowable under that grant or cooperative agreement, or has otherwise failed to discharge its obligation to account properly for funds under the grant or cooperative agreement, the Secretary shall give the recipient written notice of a preliminary departmental decision and notify the recipient of its right to have that decision reviewed by the Office and of its right to request mediation.

(2) In a preliminary departmental decision, the Secretary shall have the burden of stating a prima facie case for the recovery of funds. The facts to serve as the basis of the preliminary departmental decision may come from an audit report, an investigative report, a monitoring report, or other evidence. The amount of funds to be recovered shall be determined on the basis of section 453.

(3) For the purpose of paragraph (2), failure by a recipient to maintain records required by law, or to allow the Secretary access to such records, shall constitute a prima facie case.

(b)(1) A recipient that has received written notice of a preliminary departmental decision and that desires to have such decision reviewed by the Office shall submit to the Office an application for review not later than 30 days after receipt of notice of the preliminary departmental decision. The application shall be in the form and contain the information specified by the Office. As expeditiously as possible, the Office shall return to the Secretary for such action as the Secretary considers appropriate any preliminary departmental decision which the Office determines does not meet the requirements of subsection (a)(2).

(2) In cases where the preliminary departmental decision requests a recovery of funds from a State recipient, that State recipient may not recover funds from an affected local educational agency unless that State recipient has—

(A) transmitted a copy of the preliminary departmental decision to any affected subrecipient within 10 days of the date that the State recipient in a State administered program received such written notice; and

(B) consulted with each affected subrecipient to determine whether the State recipient should submit an application for review under paragraph (1).

(3) In any proceeding before the Office under this section, the burden shall be upon the recipient to demonstrate that it should not be required to return the amount of funds for which recovery is sought in the preliminary departmental decision under subsection (a).

(c) A hearing shall be set 90 days after receipt of a request for review of a preliminary departmental decision by the Office, except that such 90-day requirement may be waived at the discretion of the judge for good cause.

(d) Upon review of a decision of the Office by the Secretary, the findings of fact by the Office, if supported by substantial evidence, shall be conclusive. However, the Secretary, for good cause shown, may remand the case to the Office to take further evidence, and the Office may thereupon make new or modified findings of fact and may modify its previous action. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(e) Parties to the proceeding shall have 30 days to file a petition for review of a decision of the administrative law judges with the Office of the Secretary.

(f)(1) If a recipient submits a timely application for review of a preliminary departmental decision, the Secretary shall take no collection action until the decision of the Office upholding the preliminary Department decision in whole or in part becomes final agency action under subsection (g).

(2) If a recipient files a timely petition for judicial review under section 458, the Secretary shall take no collection action until judicial review is completed.

(3) The filing of an application for review under paragraph (1) or a petition for judicial review under paragraph (2) shall not affect the authority of the Secretary to take any other adverse action under this part against the recipient.

(g) A decision of the Office regarding the review of a preliminary departmental decision shall become final agency action 60 days after the recipient receives written notice of the decision unless the Secretary either—

(1) modifies or sets aside the decision, in whole or in part, in which case the decision of the Secretary shall become final agency action when the recipient receives written notice of the Secretary's action, or

(2) remands the decision to the Office.

(h) The Secretary shall publish decisions that have become final agency action under subsection (g) in the Federal Register or in another appropriate publication within 60 days.

(i) The amount of a preliminary departmental decision under subsection (a) for which review has not been requested in accordance with subsection (b), and the amount sustained by a decision of the Office or the Secretary which becomes final agency action under subsection (g), may be collected by the Secretary in accordance with chapter 37 of title 31, United States Code.

(j)(1) Notwithstanding any other provision of law, the Secretary may, subject to the notice requirements of paragraph (2), compromise any preliminary departmental decision under this section which does not exceed the amount agreed to be returned by more than $200,000, if the Secretary determines that (A) the collection of any or all or the amount thereof would not be practical or in the public interest, and (B) the practice which resulted in the preliminary departmental decision has been corrected and will not recur.

(2) Not less than 45 days prior to the exercise of the authority to compromise a preliminary departmental decision pursuant to paragraph (1), the Secretary shall publish in the Federal Register a notice of intention to do so. The notice shall provide interested persons an opportunity to comment on any proposed action under this subsection through the submission of written data, views, or arguments.

(k) No recipient under an applicable program shall be liable to return funds which were expended in a manner not authorized by law more than 5 years before the recipient received written notice of a preliminary departmental decision.

(l) No interest shall be charged arising from a claim during the administrative review of the preliminary departmental decision.

(20 U.S.C. 1234a) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 453. MEASURE OF RECOVERY.

(a)(1) A recipient determined to have made an unallowable expenditure, or to have otherwise failed to discharge its responsibility to account properly for funds, shall be required to return funds in an amount that is proportionate to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which the recipient received the award. Such amount shall be reduced in whole or in part by an amount that is proportionate to the extent the mitigating circumstances caused the violation.

(2) For the purpose of paragraph (1), an identifiable Federal interest includes, but is not limited to, serving only eligible beneficiaries; providing only authorized services or benefits; complying with expenditure requirements and conditions (such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements); preserving the integrity of planning, application, recordkeeping, and reporting requirements; and maintaining accountability for the use of funds.

(b)(1) When a State or local educational agency is determined to have made an unallowable expenditure, or to have otherwise failed to discharge its responsibility to account properly for funds, and mitigating circumstances exist, as described in paragraph (2), the judge shall reduce such amount by an amount that is proportionate to the extent the mitigating circumstances caused the violation. Furthermore, the judge is authorized to determine that no recovery is justified when mitigating circumstances warrant. The burden of demonstrating the existence of mitigating circumstances shall be upon the State or local educational agency.

(2) For the purpose of paragraph (1), mitigating circumstances exist only when it would be unjust to compel the recovery of funds because the State or local educational agency—

(A) actually and reasonably relied upon erroneous written guidance provided by the Department;

(B) made an expenditure or engaged in a practice after—

(i) the State or local educational agency submitted to the Secretary, in good faith, a written request for guidance with respect to the expenditure or practice at issue, and

(ii) a Department official did not respond within 90 days of receipt by the Department of such request; or

(C) actually and reasonably relied upon a judicial decree issued to the recipient.

(3) A written request for guidance as described in paragraph (2) sent by certified mail (return receipt requested) shall be conclusive proof of receipt by the Department.

(4) If the Secretary responds to a written request for guidance described in paragraph (2)(B) more than 90 days after its receipt, the State or local educational agency that submitted the request shall comply with the guidance received at the earliest practicable time.

(5) In order to demonstrate the existence of the mitigating circumstances described in paragraph (2)(B), the State or local educational agency shall demonstrate that—

(A) the written request for guidance accurately described the proposed expenditure or practice and included the facts necessary for a determination of its legality; and

(B) the written request for guidance contained a certification by the chief legal officer of the State educational agency that such officer had examined the proposed expenditure or practice and believed the proposed expenditure or practice was permissible under then applicable State and Federal law; and

(C) the State or local educational agency reasonably believed that the proposed expenditure or practice was permissible under then applicable State and Federal law.

(6) The Secretary shall disseminate to State educational agencies responses to written requests for guidance, described in paragraph (5), that reflect significant interpretations of applicable law or policy.

(c) The Secretary shall periodically review the written requests for guidance submitted under this section to determine the need for new or supplementary regulatory or other guidance under applicable programs.

(20 U.S.C. 1234b) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 454. REMEDIES FOR EXISTING VIOLATIONS.

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds, the Secretary may—

(1) withhold further payments under that program, as authorized by section 455;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 456;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 457; or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 452.

(20 U.S.C. 1234c) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 455. WITHHOLDING.

(a) In accordance with section 454, the Secretary may withhold from a recipient, in whole or in part, further payments (including payments for administrative costs) under an applicable program.

(b) Before withholding payments, the Secretary shall notify the recipient, in writing, of—

(1) the intent to withhold payments;

(2) the factual and legal basis for the Secretary's belief that the recipient has failed to comply substantially with a requirement of law; and

(3) an opportunity for a hearing to be held on a date at least 30 days after the notification has been sent to the recipient.

(c) The hearing shall be held before the Office and shall be conducted in accordance with the rules prescribed pursuant to subsections (f) and (g) of section 451 of this Act.

(d) Pending the outcome of any hearing under this section, the Secretary may suspend payments to a recipient, suspend the authority of the recipient to obligate Federal funds, or both, after such recipient has been given reasonable notice and an opportunity to show cause why future payments or authority to obligate Federal funds should not be suspended.

(e) Upon review of a decision of the Office by the Secretary, the findings of fact by the Office, if supported by substantial evidence, shall be conclusive. However, the Secretary, for good cause shown, may remand the case to the Office to take further evidence, and the Office may thereupon make new or modified findings of fact and may modify its previous action. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(f) The decision of the Office in any hearing under this section shall become final agency action 60 days after the recipient receives written notice of the decision unless the Secretary either—

(1) modifies or sets aside the decision, in whole or in part, in which case the decision of the Secretary shall become final agency action when the recipient receives written notice of the Secretary's action; or

(2) remands the decision of the Office.

(20 U.S.C. 1234d) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 456. CEASE AND DESIST ORDERS.

(a) In accordance with section 454, the Secretary may issue to a recipient under an applicable program a complaint which—

(1) describes the factual and legal basis for the Secretary's belief that the recipient is failing to comply substantially with a requirement of law; and

(2) contains a notice of a hearing to be held before the Office on a date at least 30 days after the service of the complaint.

(b) The recipient upon which a complaint has been served shall have the right to appear before the Office on the date specified and to show cause why an order should not be entered by the Office requiring the recipient to cease and desist from the violation of law charged in the complaint.

(c) The testimony in any hearing held under this section shall be reduced to writing and filed with the Office. If upon that hearing the Office is of the opinion that the recipient is in violation of any requirement of law as charged in the complaint, the Office shall—

(1) make a report in writing stating its findings of fact; and

(2) issue to the recipient an order requiring the recipient to cease and desist from the practice, policy, or procedure which resulted in the violation.

(d) The report and order of the Office under this section shall become the final agency action when the recipient receives the report and order.

(e) The Secretary may enforce a final order of the Office under this section which becomes final agency action by—

(1) withholding from the recipient any portion of the amount payable to it, including the amount payable for administrative costs, under the applicable program; or

(2) certifying the facts to the Attorney General who shall cause an appropriate proceeding to be brought for the enforcement of the order.

(20 U.S.C. 1234e) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 457. COMPLIANCE AGREEMENTS.

(a) In accordance with section 454, the Secretary may enter into a compliance agreement with a recipient under an applicable program. The purpose of any compliance agreement under this section shall be to bring the recipient into full compliance with the applicable requirements of law as soon as feasible and not to excuse or remedy past violations of such requirements.

(b)(1) Before entering into a compliance agreement with a recipient, the Secretary shall hold a hearing at which the recipient, affected students and parents or their representatives, and other interested parties are invited to participate. The recipient shall have the burden of persuading the Secretary that full compliance with the applicable requirements of law is not feasible until a future date.

(2) If the Secretary determines, on the basis of all the evidence presented, that full compliance is genuinely not feasible until a future date, the Secretary shall make written findings to that effect and shall publish those findings, along with the substance of any compliance agreement, in the Federal Register.

(c) A compliance agreement under this section shall contain—

(1) an expiration date not later than 3 years from the date of the written findings under subsection (b)(2), by which the recipient shall be in full compliance with the applicable requirements of law, and

(2) those terms and conditions with which the recipient must comply until it is in full compliance.

(d) If a recipient fails to comply with the terms and conditions of a compliance agreement under this section, the Secretary may consider that compliance agreement to be no longer in effect, and the Secretary may take any action authorized by law with respect to the recipient.

(20 U.S.C. 1234f) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 458. JUDICIAL REVIEW.

(a) Any recipient of funds under an applicable program that would be adversely affected by a final agency action under section 452, 455, or 456 of this Act, and any State entitled to receive funds under a program described in section 435(a) of this title whose application has been disapproved by the Secretary, shall be entitled to judicial review of such action in accordance with the provisions of this section. The Secretary may not take any action on the basis of a final agency action until judicial review is completed.

(b) A recipient that desires judicial review of an action described in subsection (a) shall, within 60 days of that action, file with the United States Court of Appeals for the circuit in which that recipient is located, a petition for review of such action. A copy of the petition shall be transmitted by the clerk of the court to the

Secretary. The Secretary shall file in the court the record of the proceedings on which the action was based, as provided in section 2112 of title 28, United States Code.

(c) The findings of fact by the Office, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Office to take further evidence, and the Office may make new or modified findings of fact and may modify its previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(d) The court shall have jurisdiction to affirm the action of the Office or the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(20 U.S.C. 1234g) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 459. USE OF RECOVERED FUNDS.

(a) Whenever the Secretary recovers funds paid to a recipient under a grant or cooperative agreement made under an applicable program because the recipient made an expenditure of funds that was not allowable, or otherwise failed to discharge its responsibility to account properly for funds, the Secretary may consider those funds to be additional funds available for that program and may arrange to repay to the recipient affected by that action an amount not to exceed 75 percent of the recovered funds if the Secretary determines that—

(1) the practices or procedures of the recipient that resulted in the violation of law have been corrected, and that the recipient is in all other respects in compliance with the requirements of that program;

(2) the recipient has submitted to the Secretary a plan for the use of those funds pursuant to the requirements of that program and, to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misuse of funds that resulted in the recovery; and

(3) the use of those funds in accordance with that plan would serve to achieve the purposes of the program under which the funds were originally paid.

(b) Any payments by the Secretary under this section shall be subject to such other terms and conditions as the Secretary considers necessary to accomplish the purposes of the affected programs, including—

(1) the submission of periodic reports on the use of funds provided under this section; and

(2) consultation by the recipient with students, parents, or representatives of the population that will benefit from the payments.

(c) Notwithstanding any other provisions of law, the funds made available under this section shall remain available for expenditure for a period of time deemed reasonable by the Secretary, but in no case to exceed more than 3 fiscal years following the fiscal year in which final agency action under section 452(e) is taken.

(d) At least 30 days prior to entering into an arrangement under this section, the Secretary shall publish in the Federal Register a notice of intent to enter into such an arrangement and the terms and conditions under which payments will be made. Interested persons shall have an opportunity for at least 30 days to submit comments to the Secretary regarding the proposed arrangement.

(20 U.S.C. 1234h) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

SEC. 460. DEFINITIONS.

For purposes of this part:

(1) The term "recipient" means a recipient of a grant or cooperative agreement under an applicable program.

(2) The term "applicable program" excludes programs authorized by the Higher Education Act of 1965 and assistance programs provided under the Act of September 30, 1950 (Public Law 874, 81st Congress), and the Act of September 23, 1950 (Public Law 815, 81st Congress).

(20 U.S.C. 1234i) Enacted April 28, 1988, P.L. 100-297, sec. 3501, 102 Stat. 349.

§ 75.564 Restricted indirect cost rate—formula.

(a) An indirect cost rate for a grant under a program covered by § 75.563 is determined by the following formula:

Indirect cost rate = (Administrative charge + Fixed charges) ÷ (Other expenditures)

(b) Administrative charges, fixed charges, and other expenditures must be determined under §§ 75.565–75.567.

(c) Under the programs covered by § 75.563, a grantee other than a State or a local government (as those terms are defined in 34 CFR 74.3) may use:

(1) An indirect cost rate computed under paragraph (a) of this section; or

(2) An indirect cost rate of eight percent unless the Secretary determines that the grantee would have a lower rate under paragraph (a) of this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.565 Administrative charge.

(a) As used in § 75.564, "administrative charge" means the cost of an activity that is for the direction and control of the grantee's affairs that are organization-wide. An activity is not organization-wide if it is limited to one activity, one component of the grantee, one subject, one phase of operations, or other single responsibility.

(b) The term includes the cost of performing a service function, such as accounting, payroll preparation, or personnel management, that is normally at the grantee's level even if the function is physically located elsewhere for convenience or better management.

(c) The term does not include expenditures for:

(1) The governing body of the grantee;

(2) Compensation of the chief administrative officer of the grantee;

(3) Compensation of the chief administrative officer of any component of the grantee; and

(4) Operation of the immediate offices of these officers.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.566 Fixed charges.

As used in § 75.564, "fixed charges" means contributions of the grantee to:

(a) Retirement, including State, county, or local retirement funds, Social Security, and pension payments;

(b) Unemployment compensation payments;

(c) Property, employee, health, and liability insurance; and

(d) All similar costs normally considered to be employee fringe benefits.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.567 Other expenditures.

(a) As used in § 75.564, "other expenditures" means the grantee's total expenditures for its federally- and non-federally-funded activities in the most recent year for which data are available.

(b) The term does not include:

(1) Administrative charges determined under § 75.565;

(2) Fixed charges determined under § 75.566;

(3) Capital outlay;

(4) Debt service;

(5) Fines and penalties;

(6) Contingencies; and

(7) Election expenses. However, the term does include election expenses that result from elections required by a program statute.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.568 Using the restricted indirect cost rate.

(a) Under the programs referenced in § 75.563, the maximum amount of indirect costs under a grant is determined by the following formula:

Indirect costs = (Indirect cost rate) × (Total direct costs of the grant minus any costs for capital outlay, debt service, or election expenses unless the election is required by a program statute)

(b) If a grantee uses an indirect cost rate, the administrative and fixed charges covered by that rate must be excluded by the grantee from the direct costs it charges to the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CONSTRUCTION

CROSS-REFERENCE. See 34 CFR Part 74, Subpart P—Procurement Standards.

§ 75.600 Use of a grant for construction: purpose of §§ 75.601–75.615.

Sections 75.601–75.615 apply to:

(a) An applicant that requests funds for construction; and

(b) A grantee whose grant includes funds for construction.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.601 Applicant's assessment of environmental impact.

An applicant shall include with its application its assessment of the impact of the proposed construction on the quality of the environment in accordance with Section 102(2)(C) of the National Environmental Policy Act of 1969 and Executive Order 11514 (34 FR 4247).

(Authority: 42 U.S.C. 4332(2)(C))

§ 75.602 Preservation of historic sites must be described in the application.

(a) An applicant shall describe in its application the relationship of the proposed construction to and probable effect on any district, site, building, structure, or object that is:

(1) Included in the National Register of Historic Places; or

(2) Eligible under criteria established by the Secretary of Interior for

inclusion in the National Register of Historic Places.

CROSS-REFERENCE. See 36 CFR Part 60 for these criteria.

(b) In deciding whether to make a grant, the Secretary considers:

(1) The information provided by the applicant under paragraph (a) of this section; and

(2) Any comments by the Advisory Council on Historic Preservation.

CROSS-REFERENCE. See 36 CFR Part 800, which provides for comments from the Council.

(Authority: 16 U.S.C. 470f)

§ 75.603 Grantee's title to site.

A grantee must have or obtain a full title or other interest in the site, including right of access, that is sufficient to insure the grantee's undisturbed use and possession of the facilities for 50 years or the useful life of the facilities, whichever is longer.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.604 Availability of cost-sharing funds.

A grantee shall ensure that sufficient funds are available to meet any non-Federal share of the cost of constructing the facility.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.605 Beginning the construction.

(a) A grantee shall begin work on construction within a reasonable time after the grant for the construction is made.

(b) Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.606 Completing the construction.

(a) A grantee shall complete its construction within a reasonable time.

(b) The grantee shall complete the construction in accordance with the application and approved drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.607 General considerations in designing facilities and carrying out construction.

(a) A grantee shall insure that the construction is:

(1) Functional;

(2) Economical; and

(3) Not elaborate in design or extravagant in the use of materials, compared with facilities of a similar type constructed in the State or other applicable geographic area.

(b) The grantee shall, in developing plans for the facilities, consider excellence of architecture and design and inclusion of works of art. The grantee may not spend more than one percent of the cost of the project on inclusion of works of art.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.608 Areas in the facilities for cultural activities.

A grantee shall make reasonable provision, consistent with the other uses to be made of the facilities, for areas in the facilities that are adaptable for artistic and other cultural activities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.609 Comply with safety and health standards.

In planning for and designing facilities, a grantee shall observe:

(a) The standards under the Occupational Safety and Health Act of 1970 (Pub. L. 91-596) (See 36 CFR Part 1910); and

(b) State and local codes, to the extent that they are more stringent.

(Authority: 29 U.S.C. 651)

§ 75.610 Access by the handicapped.

A grantee shall comply with the Federal regulations on access by the handicapped that apply to construction and alteration of facilities. These regulations are:

(a) For residential facilities—24 CFR Part 40; and

(b) For non-residential facilities—41 CFR Subpart 101-19.6.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.611 Avoidance of flood hazards.

In planning the construction, a grantee shall, in accordance with the provisions of Executive Order 11988 of February 10, 1978 (43 FR 6030) and rules and regulations that may be issued by the Secretary to carry out those provisions:

(a) Evaluate flood hazards in connection with the construction; and

(b) As far as practicable, avoid uneconomic, hazardous, or unnecessary use of flood plains in connection with the construction.

(Authority: Executive Order 11296)

§ 75.612 Supervision and inspection by the grantee.

A grantee shall maintain competent architectural engineering supervision and inspection at the construction site to insure that the work conforms to the approved drawings and specifications.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.613 Relocation assistance by the grantee.

A grantee is subject to the regulations on relocation assistance and real property acquisition in 34 CFR Part 15.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.614 Grantee must have operational funds.

A grantee shall insure that, when construction is completed, sufficient funds will be available for effective operation and maintenance of the facilities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 75.615 Operation and maintenance by the grantee.

A grantee shall operate and maintain the facilities in accordance with applicable Federal, State, and local requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1))

PART 76—STATE-ADMINISTERED PROGRAMS

Subpart A—General

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AUTHORITY: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474, unless otherwise noted.

SOURCE: 45 FR 22517, Apr. 3, 1980, unless otherwise noted. Redesignated at 45 FR 77368, Nov. 21, 1980.

Subpart A—General

REGULATIONS THAT APPLY TO STATE-ADMINISTERED PROGRAMS

§ 76.1 Programs to which Part 76 applies.

(a) The regulations in Part 76 apply to each State-administered program of the Department.

(b) If a State formula grant program does not have implementing regulations, the Secretary implements the program under the authorizing statute and, to the extent consistent with the authorizing statute, under the General Education Provisions Act and the regulations in this part. For the purposes of this part, the term "State formula grant program" means a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84059, Dec. 22, 1980; 47 FR 52354, Nov. 19, 1982; 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

§ 76.2 Exceptions in program regulations to Part 76.

If a program has regulations that are not consistent with Part 76, the implementing regulations for that program identify the sections of Part 76 that do not apply.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 21776, May 19, 1989]

§ 76.3 ED general grant regulations apply to these programs.

The ED general grant regulations in 34 CFR Part 74 apply to the programs covered by this part. To find subjects covered under 34 CFR Part 74, look in the table of contents at the beginning of 34 CFR Part 74.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ELIGIBILITY FOR A GRANT OR SUBGRANT

§ 76.50 Statutes determine eligibility and whether subgrants are made.

(a) Under a program covered by this part, the Secretary makes a grant:

(1) To the State agency designated by the authorizing statute for the program; or

(2) To the State agency designated by the State in accordance with the authorizing statute.

(b) The authorizing statute determines the extent to which a State may:

(1) Use grant funds directly; and

(2) Make subgrants to eligible applicants.

(c) The regulations in Part 76 on subgrants apply to a program only if subgrants are authorized under that program.

(d) The authorizing statute determines the eligibility of an applicant for a subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 52 FR 27804, July 24, 1987; 54 FR 21776, May 19, 1989]

§ 76.51 A State distributes funds by formula or competition.

If a program statute authorizes a State to make subgrants, the statute:

(a) Requires the State to use a formula to distribute funds;

(b) Gives the State discretion to select subgrantees through a competition among the applicants or through some other procedure; or

(c) Allows some combination of these procedures.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 54 FR 21776, May 19, 1989]

Subpart B—How a State Applies for a Grant

STATE PLANS AND APPLICATIONS

§ 76.100 Effect of this subpart.

This subpart establishes general requirements that a State must meet to apply for a grant under a program covered by this part. Additional requirements are in the authorizing statute and the implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[52 FR 27804, July 24, 1987]

§ 76.101 The general State application.

A State that makes subgrants to local educational agencies under a program subject to this part shall have on file with the Secretary a general application that meets the requirements of Section 435 of the General Education Provisions Act.

(Authority: 20 U.S.C. 1232d)

[52 FR 27804, July 24, 1987]

§ 76.102 Definition of "State plan" for Part 76.

As used in this part, "State plan" means any of the following documents:

(a) *Compensatory education.* The application under Section 162 of Title I of the Elementary and Secondary Education Act.

(b) *Migrant children.* The application under Sections 141-143 of the Elementary and Secondary Education Act.

(c) *Basic skills.* The agreement under Title II-B of the Elementary and Secondary Education Act.

(d) *Library resources.* The State plan under Title II of the Elementary and Secondary Education Act (as in effect on Sept. 30, 1978).

(e) *Innovative projects; Guidance and Counseling.* The State plan under Title III of the Elementary and Secondary Education Act (as in effect on Sept. 30, 1978).

(f) *Educational Improvement, Resources, and Support.* The State plan under Title IV of the Elementary and Secondary Education Act.

(g) *State educational agencies.* The State plan under Title V-B of the Elementary and Secondary Education Act.

(h) *State educational agencies.* The application under Title V-A of the Elementary and Secondary Education Act (as in effect September 30, 1978).

(i) *Community schools.* The State plan under Title VIII of the Elementary and Secondary Education Act.

(j) *Gifted and talented children.* The application under Section 904(b)(1) of Title IX of the Elementary and Secondary Education Act.

(k) *Academic subjects.* The State plan under Title III-A of the National Defense Education Act.

(l) *Handicapped children.* The State plan under Part B of the Education of the Handicapped Act.

(m) *Handicapped children.* The application under Section 619 of the Education of the Handicapped Act.

(n) *Vocational education.* The annual program plan and the annual accountability report under Part A of Title I of the Vocational Education Act.

(o) *Career education.* The State plan under Section 7 of the Career Education Incentive Act.

(p) *Adult education.* The State plan under the Adult Education Act.

(q) *Community services.* The State plan under Title I of the Higher Education Act.

(r) *State student incentive grants.* The application under Section 415C of the Higher Education Act.

(s) *Educational information centers.* The State plan under Section 418B of the Higher Education Act.

(t) *Incentive grants for State student financial asistance training.* The application under Section 493C of the Higher Education Act.

(u) *Postsecondary commissions.* The application for intrastate planning under Section 1203(a) of the Higher Education Act.

(v) *Libraries.* The basic State plan a long-range program, and an annual program under the Library Services and Construction Act.

(w) *State equalization.* The application under Section 842 of the Education Amendments of 1974.

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(x) *Client Assistance Program.* The written request for assistance under section 112 of the Rehabilitation Act of 1973, as amended.

(y) *Removal of Architectural Barriers to the Handicapped.* The application under Section 607 of the Education of the Handicapped Act.

(z) *Emergency Immigrant Education.* The application under the Emergency Immigrant Education Program.

(aa) *Math-science programs.* The State application under Section 209 of Title II of the Education for Economic Security Act.

(bb) *Programs that do not have regulations.* If a State-administered program does not have implementing regulations, the documents that the authorizing statute for the program requires a State to submit to receive a grant.

(cc) *Carl D. Perkins Scholarship Program.* The application under Section 563 of the Higher Education Act.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 84060, Dec. 22, 1980; 50 FR 9962, Mar. 12, 1985; 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 33188, Aug. 16, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 52 FR 27804, July 24, 1987]

§ 76.103 Three-year State plans.

(a) Beginning no later than fiscal year 1981, each State plan will be effective for a period of three fiscal years, unless the program regulations provide for a longer effective period.

(b) If the Secretary determines that the three-year State plans under a program should be submitted by the States on a staggered schedule, the Secretary may require groups of States to submit or resubmit their plans in different years.

(c) This section does not apply to:

(1) The annual accountability report under Part A of Title I of the Vocational Education Act;

(2) The annual programs under the Library Services and Construction Act;

(3) The application under Sections 141-143 of the Elementary and Secondary Education Act; and

(4) The State application under Section 209 of Title II of the Education for Economic Security Act.

(d) A State may submit an annual State plan under the Vocational Education Act. If a State submits an annual plan under that program, this section does not apply to that plan.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231g(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985]

§ 76.104 A State shall include certain certifications in its State plan.

(a) A State shall include the following certifications in each State plan:

(1) That the plan is submitted by the State agency that is eligible to submit the plan.

(2) That the State agency has authority under State law to perform the functions of the State under the program.

(3) That the State legally may carry out each provision of the plan.

(4) That all provisions of the plan are consistent with State law.

(5) That a State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the plan.

(6) That the State officer who submits the plan, specified by title in the certification, has authority to submit the plan.

(7) That the agency that submits the plan has adopted or otherwise formally approved the plan.

(8) That the plan is the basis for State operation and administration of the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.106 State documents are public information.

A State shall make the following documents available for public inspection:

(a) All State plans and related official materials.

(b) All approved subgrant applications.

(c) All documents that the Secretary transmits to the State regarding a program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CONSOLIDATED GRANT APPLICATIONS FOR INSULAR AREAS

AUTHORITY: Title V, Pub. L. 95-134, 91 Stat. 1159 (48 U.S.C. 1469a).

§ 76.125 What is the purpose of these regulations?

(a) Sections 76.125 through 76.137 of this part contain requirements for the submission of an application by an Insular Area for the consolidation of two or more grants under the programs listed in paragraph (c) of this section.

(b) For the purpose of §§ 76.125-76.137 of this part the term "Insular Area" means the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Commonwealth of the Northern Mariana Islands.

(c) The Secretary may make an annual consolidated grant to assist an Insular Area in carrying out one or more of the following programs:

CFDA No. and name of program	Authorizing legislation	Implementing regulations, Title 34 CFR (Part)
Library Programs		
84.034 Public Library Services State Grant Program	Title I, Library Services and Construction Act (20 U.S.C. 351-354)	770
84.035 Interlibrary Cooperation	Title III, Library Services and Construction Act (20 U.S.C. 355e-355e-2)	770
Postsecondary Education Programs		
84.001 Grants for Construction, Reconstruction, and of Undergraduate Academic Facilities	Title VII, Part E of the Higher Education Act (20 U.S.C. 1132b-1132b-2)	617
84.046 Education Outreach Programs	Title I, Part B of the Higher Education Act (20 U.S.C. 1011-1019)	610
84.135 Aid to Land-Grant Colleges	Second Morrill Act of 1890 (7 U.S.C. 322 and 323)	621
84.176 Carl D. Perkins Scholarship Program	Title V Part E of the Higher Education Act (20 U.S.C. 1119d-1119d-8)	653
Vocational and Adult Education Programs		
84.002 Adult Education—State-administered Programs	Adult Education Act (except) Sections 309, 316 and 318) (20 U.S.C. 1201 et seq.)	426
84.048 Vocational Education—Basic Grants to States	Title I, Part A of the Vocational Education Act (20 U.S.C. 2301-2380)	400
84.049 Vocational Education—Consumer and Homemaking Education	Title I, Part A, Section 150 of the Vocational Education Act (20 U.S.C. 2380)	400
84.050 Vocational Education—Program Improvement and Services	Title I, Part A, Section 130-136 of the Vocational Education Act (20 U.S.C. 2350-2356)	400
84.052 Vocational Education—Special Programs for the Disadvantaged	Title I, Part A, Section 140 of the Vocational Education Act (20 U.S.C. 2370)	400
84.053 Vocational Education—State Advisory Council	Title I, Part A, Section 105 of the Vocational Education Act (20 U.S.C. 2305)	400
84.121 Vocational Education—State Planning and Evaluation	Title I, Part A, Sections 102 and 111 of the Vocational Education Act (20 U.S.C. 2302 and 2311)	400
Education for the Handicapped Programs		
84.009 Program for Education of Handicapped Children in State Operated or Supported Schools	Section 554(a)(2)(B), of Chapter 1 of the Education Consolidation & Improvement Act of 1981 (20 U.S.C. 3803 and 20 U.S.C. 2771-2772)	302
84.027 Handicapped Preschool and School Programs—State Grant Programs	Education of Handicapped Act Part B (except Section 619) (20 U.S.C. 1411-1418; 1420)	300

CFDA No. and name of program	Authorizing legislation	Implementing regulations, Title 34 CFR (Part)
84.027 Handicapped Preschool and School Program—Incentive Grants.	Section 619 of the Education of the Handicapped Act (20 U.S.C. 1419).	301
84.155 Removal of architectural barriers to the handicapped.	Section 607, Education of the Handicapped Act (20 U.S.C. 1406).	304
Other Elementary and Secondary Programs		
84.010 Educationally Deprived Children—Local Educational Agencies.	Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3801-3807).	200
84.011 Migrant Education Programs State Formula Grant Program.	Section 554(a)(2)(A) of Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3803 and 20 U.S.C. 2781).	204
84.012 Educationally Deprived Children—State Administration.	Chapter I of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3801-3807)	200
84.013 Educationally Deprived Children in State Administered Institutions Serving Neglected and Delinquent Children.	Section 554(a)(2)(C) of Chapter 1 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3803 and 20 U.S.C. 2781).	203
84.068 Indochinese Refugee Children Assistance Act.	Subpart C of the Consolidated Refugee Assistance Act (8 U.S.C. 1522).	537
84.150 Chapter 2—Consolidation of Federal Programs for Elementary and Secondary Education.	Chapter 2 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 2811-3862)	298
84.162—Emergency Immigrant Education Program	Title VI of Pub. L. 98-511 (20 U.S.C. 4101-4108)	581
84.164 State Grants for Strengthening the Skills of teachers and Instruction in Mathematics, Science, Foreign Languages, and Computer Learning and for Increasing the Access of All Students to That Instruction	Title II of the Education for Economic Security Act (20 U.S.C. 3961-3971, 3973).	208

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[47 FR 17421, Apr. 22, 1982, as amended at 50 FR 29330, July 18, 1985; 50 FR 32564, Aug. 13, 1985; 50 FR 43545, Oct. 25, 1985; 51 FR 35583, Oct. 6, 1986; 54 FR 21776, May 19, 1989]

§ 76.126 What regulations apply to the consolidated grant applications for insular areas?

The following regulations apply to those programs included in a consolidated grant:

(a) The regulations in §§ 76.125 through 76.137; and

(b) The regulations that apply to each specific program included in a consolidated grant for which funds are used.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.127 What is the purpose of a consolidated grant?

An Insular Area may apply for a consolidated grant for two or more of the programs listed in § 76.125(c). This procedure is intended to:

(a) Simplify the application and reporting procedures that would otherwise apply for each of the programs included in the consolidated grant; and

(b) Provide the Insular Area with flexibility in allocating the funds under the consolidated grant to achieve any of the purposes to be served by the programs that are consolidated.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.128 What is a consolidated grant?

A consolidated grant is a grant to an Insular Area for any two or more of the programs listed in § 76.125(c). The amount of the consolidated grant is the sum of the allocations the Insular Area receives under each of the programs included in the consolidated grant if there had been no consolidation.

Example. Assume the Virgin Islands applies for a consolidated grant that includes programs under the Adult Education Act, Vocational Education Act, and Chapter 1 of the Education Consolidation and Improvement Act. If the Virgin Islands' allocation under the formula for each of these three programs is $150,000; the total consolidated grant to the Virgin Islands would be $450,000.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.129 How does a consolidated grant work?

(a) An Insular Area shall use the funds it receives under a consolidated grant to carry out, in its jurisdiction, one or more of the programs included in the grant.

Example. Assume that Guam applies for a consolidated grant under the Vocational Education Act, the Handicapped Preschool and School Programs-Incentive Grants, and the Adult Education Act and that the sum of the allocations under these programs is $700,000. Guam may choose to allocate this $700,000 among all of the programs authorized under the three programs. Alternatively, it may choose to allocate the entire $700,000 to one or two of the programs; for example, the Adult Education Act Program.

(b) An Insular Area shall comply with the statutory and regulatory requirements that apply to each program under which funds from the consolidated grant are expended.

Example. Assume that American Samoa uses part of the funds under a consolidated grant for the State program under the Adult Education Act. American Samoa need not submit to the Secretary a State plan that requires policies and procedures to assure all students equal access to adult education programs. However, in carrying out the program, American Samoa must meet and be able to demonstrate compliance with this equal access requirement.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.130 How are consolidated grants made?

(a) The Secretary annually makes a single consolidated grant to each Insular Area that meets the requirements of §§ 76.125 through 76.137 and each program under which the grant funds are to be used and administered.

(b) The Secretary may decide that one or more programs cannot be included in the consolidated grant if the Secretary determines that the Insular Area failed to meet the program objectives stated in its plan for the previous fiscal year in which it carried out the programs.

(c) Under a consolidated grant, an Insular Area may use a single advisory council for any or all of the programs that require an advisory council.

(d) Although Pub. L. 95-134 authorizes the Secretary to consolidate grant funds that the Department awards to an Insular Area, it does not confer eligibility for any grant funds. The eligibility of a particular Insular Area to receive grant funds under a Federal education program is determined under the statute and regulations for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.131 How does an insular area apply for a consolidated grant?

(a) An Insular Area that desires to apply for a grant consolidating two or more programs listed in § 76.125(c) shall submit to the Secretary an application that:

(1) Contains the assurances in § 76.132; and

(2) Meets the application requirements in paragraph (c) of this section.

(b) The submission of an application that contains these requirements and assurances takes the place of a separate State plan or other similar document required by this part or by the authorizing statutes and regulations for programs included in the consolidated grant.

(c) An Insular Area shall include in its consolidated grant application a program plan that:

(1) Contains a list of the programs in § 76.125(c) to be included in the consolidated grant;

(2) Describes the program or programs in § 76.125(c) under which the consolidated grant funds will be used and administered;

(3) Describes the goals, objectives, activities, and the means of evaluating program outcomes for the programs for which the Insular Area will use the funds received under the consolidated grant during the fiscal year for which it submits the application, including needs of the population that will be met by the consolidation of funds; and

(4) Contains a budget that includes a description of the allocation of funds—including any anticipated carryover funds of the program in the consolidated grant from the preceding year—among the programs to be included in the consolidated grant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982, as amended at 53 FR 49143, Dec. 6, 1988]

§ 76.132 What assurances must be in a consolidated grant application?

(a) An Insular Area shall include in its consolidated grant application assurances to the Secretary that it will:

(1) Follow policies and use administrative practices that will insure that non-Federal funds will not be supplanted by Federal funds made available under the authority of the programs in the consolidated grant;

(2) Comply with the requirements (except those relating to the submission of State plans or similar documents) in the authorizing statutes and implementing regulations for the programs under which funds are to be used and administered, (except requirements for matching funds);

(3) Provide for proper and efficient administration of funds in accordance with the authorizing statutes and implementing regulations for those programs under which funds are to be used and administered;

(4) Provide for fiscal control and fund accounting procedures to assure proper disbursement of, and accounting for, Federal funds received under the consolidated grant;

(5) Submit an annual report to the Secretary containing information covering the program(s) for which the grant is used and administered, including financial and program performance information required under 34 CFR Part 74, Subparts I and J;

(6) Provide that funds received under the consolidated grant will be under control of, and that title to property acquired with these funds will be in, a public agency, institution, or organization. The public agency shall administer these funds and property;

(7) Keep records, including a copy of the State Plan or application document under which funds are to be spent, which show how the funds received under the consolidated grant have been spent.

(8) Adopt and use methods of monitoring and providing technical assistance to any agencies, organizations, or institutions that carry out the programs under the consolidated grant and enforce any obligations imposed on them under the applicable statutes and regulations.

(9) Evaluate the effectiveness of these programs in meeting the purposes and objectives in the authorizing statutes under which program funds are used and administered;

(10) Conduct evaluations of these programs at intervals and in accordance with procedures the Secretary may prescribe; and

(11) Provide appropriate opportunities for participation by local agencies, representatives of the groups affected by the programs, and other interested institutions, organizations, and individuals in planning and operating the programs.

(b) These assurances remain in effect for the duration of the programs they cover.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.133 What is the reallocation authority?

(a) After an Insular Area receives a consolidated grant, it may reallocate the funds in a manner different from the allocation described in its consolidated grant application. However, the funds cannot be used for purposes that are not authorized under the programs in the consolidated grant under which funds are to be used and administered.

(b) If an Insular Area decides to reallocate the funds it receives under a consolidated grant, it shall notify the Secretary by amending its original application to include an update of the information required under § 76.131.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.134 What is the relationship between consolidated and non-consolidated grants?

(a) An Insular Area may request that any number of programs in § 76.125(c) be included in its consolidated grant and may apply separately for assistance under any other programs listed in § 76.125(c) for which it is eligible.

(b) Those programs that an Insular Area decides to exclude from consolidation—for which it must submit separate plans or applications—are implemented in accordance with the applicable program statutes and regulations. The excluded programs are not subject to the provisions for allocation of funds among programs in a consolidated grant.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.135 Are there any requirements for matching funds?

The Secretary waives all requirements for matching funds for those programs that are consolidated by an Insular Area in a consolidated grant application.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.136 Under what programs may consolidated grant funds be spent?

Insular Areas may only use and administer funds under programs listed in § 76.125(c)(1) during a fiscal year for which the Insular Area is entitled to receive funds under an appropriation for that program.

(Authority: 48 U.S.C. 1469a)

[47 FR 17421, Apr. 22, 1982]

§ 76.137 How may carryover funds be used under the consolidated grant application?

Any funds under any applicable program which are available for obligation and expenditure in the year succeeding the fiscal year for which they are appropriated must be obligated and expended in accordance with the consolidated grant application submitted by the Insular Area for that program for the succeeding fiscal year.

(Authority: 20 U.S.C. 1225(b); 48 U.S.C. 1469a)

AMENDMENTS

§ 76.140 Amendments to a State plan.

(a) If the Secretary determines that an amendment to a State plan is essential during the effective period of the plan, the State shall make the amendment.

(b) A State shall also amend a State plan if there is a significant and relevant change in:

(1) The information or the assurances in the plan;

(2) The administration or operation of the plan; or

(3) The organization, policies, or operations of the State agency that received the grant, if the change materially affects the information or assurances in the plan.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1231g(a))

§ 76.141 An amendment requires the same procedures as the document being amended.

If a State amends a State plan under § 76.140, the State shall use the same procedures as those it must use to prepare and submit a State plan.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.142 An amendment is approved on the same basis as the document being amended.

The Secretary uses the same procedures to approve an amendment to a State plan—or any other document a State submits—as the Secretary uses to approve the original document.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart C—How a Grant Is Made to a State

APPROVAL OR DISAPPROVAL BY THE SECRETARY

§ 76.201 A State plan must meet all statutory and regulatory requirements.

The Secretary approves a State plan if it meets the requirements of the Federal statutes and regulations that apply to the plan.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.202 Opportunity for a hearing before a State plan is disapproved.

The Secretary may disapprove a State plan only after:

(a) Notifying the State;

(b) Offering the State a reasonable opportunity for a hearing; and

(c) Holding the hearing, if requested by the State.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.235 The notification of grant award.

(a) To make a grant to a State, the Secretary issues and sends to the State a notification of grant award.

(b) The notification of grant award tells the amount of the grant and provides other information about the grant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

ALLOTMENTS AND REALLOTMENTS OF GRANT FUNDS

§ 76.260 Allotments are made under program statute or regulations.

(a) The Secretary allots program funds to a State in accordance with the authorizing statute or implementing regulations for the program.

(b) Any reallotment to other States will be made by the Secretary in accordance with the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 3474(a)).

[50 FR 29330, July 18, 1985]

§ 76.261 Reallotted funds are part of a State's grant.

Funds that a State receives as a result of a reallotment are part of the State's grant for the appropriate fiscal year. However, the Secretary does not consider a reallotment in determining the maximum or minimum amount to which a State is entitled for a following fiscal year.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart D—How To Apply to the State for a Subgrant

§ 76.300 Contact the State for procedures to follow.

An applicant for a subgrant can find out the procedures it must follow by contacting the State agency that administers the program.

(Authority: 20 U.S.C. 1221e-3(a)(1))

CROSS-REFERENCE. See Subparts E and G of this part for the general responsibilities of the State regarding applications for subgrants.

§ 76.301 Local educational agency general application.

A local educational agency that applies for a subgrant under a program subject to this part shall have on file with the State a general application that meets the requirements of Section 436 of the General Education Provisions Act.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232d)

[52 FR 27804, July 24, 1987; 53 FR 49143, Dec. 6, 1988]

§ 76.302 The notice to the subgrantee.

A State shall notify a subgrantee in writing of:

(a) The amount of the subgrant;

(b) The period during which the subgrantee may obligate the funds; and

(c) The Federal requirements that apply to the subgrant.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.303 Joint applications and projects.

(a) Two or more eligible parties may submit a joint application for a subgrant.

(b) If the State must use a formula to distribute subgrant funds (see § 76.51), the State may not make a subgrant that exceeds the sum of the entitlements of the separate subgrantees.

(c) If the State funds the application, each subgrantee shall:

(1) Carry out the activities that the subgrantee agreed to carry out; and

(2) Use the funds in accordance with Federal requirements.

(d) Each subgrantee shall use an accounting system that permits identification of the costs paid for under its subgrant.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.304 Subgrantee shall make subgrant application available to the public.

A subgrantee shall make any application, evaluation, periodic program plan, or report relating to each program available for public inspection.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1232e)

§ 76.305 Amendments to applications.

If a subgrantee makes a significant amendment to its application, the subgrantee shall use the same procedures as those it must use to submit an application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

Subpart E—How a Subgrant Is Made to an Applicant

§ 76.400 State procedures for reviewing an application.

A State that receives an application for a subgrant shall take the following steps:

(a) *Review.* The State shall review the application.

(b) *Approval—entitlement programs.* The State shall approve an application if:

(1) The application is submitted by an applicant that is entitled to receive a subgrant under the program; and

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program.

(c) *Approval—discretionary programs.* The State may approve an application if:

(1) The application is submitted by an eligible applicant under a program in which the State has the discretion to select subgrantees;

(2) The applicant meets the requirements of the Federal statutes and regulations that apply to the program; and

(3) The State determines that the project should be funded under the authorizing statute and implementing regulations for the program.

(d) *Disapproval—entitlement and discretionary programs.* If an application does not meet the requirements of the Federal statutes and regulations that apply to a program, the State shall not approve the application.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.401 Disapproval of an application—opportunity for a hearing.

(a) *State agency hearing before disapproval.* Under the following programs the State agency that administers the program shall provide an application with notice and an opportunity for a hearing before it may disapprove the application:

(1) Chapter 1 Program in Local Educational Agencies.

(2) Grants to State Agencies for Programs To Meet the Special Educational Needs of Children in Institutions for Neglected or Delinquent Children.

(3) Supplementary Centers and Services, Guidance, Counseling, and Testing Programs.

(4) Strengthening Instruction in Academic Subjects in Public Schools.

(5) State-operated Programs for Handicapped Children.

(6) Assistance to States for Education of Handicapped Children.

(7) State Vocational Education Programs.

(8) State Grants for Strengthening the Skills of Teachers and Instruction in Mathematics, Science, Foreign Languages, and Computer Learning and for Increasing the Access of All Students to That Instruction.

(9) Federal, State, and Local Partnership for Educational Improvement.

(b) *Other programs—hearings not required.* Under other programs covered by this part, a State agency—other than a State educational agency—is not required to provide an opportunity for a hearing regarding the agency's disapproval of an application.

(c) If an applicant for a subgrant alleges that any of the following actions of a State educational agency violates a State or Federal statute or regulation, the State educational agency and the applicant shall use the procedures in paragraph (d) of this section:

(1) Disapproval of or failure to approve the application or project in whole or in part.

(2) Failure to provide funds in amounts in accordance with the re-

quirements of statutes and regulations.

(d) *State educational agency hearing procedures.* (1) If the applicant applied under a program listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing before the agency disapproves the application.

(2) If the applicant applied under a program not listed in paragraph (a) of this section, the State educational agency shall provide an opportunity for a hearing either before or after the agency disapproves the application.

(3) The applicant shall request the hearing within 30 days of the action of the State educational agency.

(4)(i) Within 30 days after it receives a request, the State educational agency shall hold a hearing on the record and shall review its action.

(ii) No later than 10 days after the hearing the agency shall issue its written ruling, including findings of fact and reasons for the ruling.

(iii) If the agency determines that its action was contrary to State or Federal statutes or regulations that govern the applicable program, the agency shall rescind its action.

(5) If the State educational agency does not rescind its final action after a review under this paragraph, the applicant may appeal to the Secretary. The applicant shall file a notice of the appeal with the Secretary within 20 days after the applicant has been notified by the State educational agency of the results of the agency's review. If supported by substantial evidence, findings of fact of the State educational agency are final.

(6)(i) The Secretary may also issue interim orders to State educational agencies as he or she may decide are necessary and appropriate pending appeal or review.

(ii) If the Secretary determines that the action of the State educational agency was contrary to Federal statutes or regulations that govern the applicable program, the Secretary issues an order that requires the State educational agency to take appropriate action.

(7) Each State educational agency shall make available at reasonable times and places to each applicant all records of the agency pertaining to any review or appeal the applicant is conducting under this section, including records of other applicants.

(8) If a State educational agency does not comply with any provision of this section, or with any order of the Secretary under this section, the Secretary immediately terminates all assistance to the State educational agency under the applicable program.

(e) *Other State agency hearing procedures.* State agencies that are required to provide a hearing under paragraph (a) of this section—other than State educational agencies—are not required to use the procedures in paragraph (d) of this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1231b-2, 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 50 FR 43545, Oct. 25, 1985; 52 FR 27805, July 24, 1987; 54 FR 21775 and 21776, May 19, 1989; 55 FR 14816, Apr. 18, 1990]

Subpart F—What Conditions Must Be Met by the State and Its Subgrantees?

NONDISCRIMINATION

§ 76.500 Federal statutes and regulations on nondiscrimination.

A State and a subgrantee shall comply with the following statutes and regulations:

Subject	Statute	Regulation
Discrimination on the basis of race, color, or national origin.	Title VI of the Civil Rights Act of 1964 (45 U.S.C. 2000d through 2000d-4)	34 CFR Part 100.
Discrimination on the basis of sex.	Title IX of the Education Amendments of 1972 (20 U.S.C. 1681-1683).	34 CFR Part 106.
Discrimination on the basis of handicap.	Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).	34 CFR Part 104.
Discrimination on the basis of age.	The Age Discrimination Act (42 U.S.C. 6101 *et seq.*)	45 CFR Part 90.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

ALLOWABLE COSTS

§ 76.530 General cost principles.

Subpart Q of 34 CFR Part 74 references the general cost principles that apply to grants, subgrants, and cost-type contracts under grants and subgrants.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section.

(3) Construction, remodeling, repair, operation, or maintenance of any facility or part of a facility to be used for any of the activities specified in paragraph (a)(1) of this section.

(4) An activity of a school or department of divinity.

(b) As used in this section, "school or department of divinity" means an institution or a component of an institution whose program is specifically for the education of students to:

(1) Prepare them to enter into a religious vocation; or

(2) Prepare them to teach theological subjects.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.533 Acquistion of real property; construction.

No State or subgrantee may use its grant or subgrant for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.534 Use of tuition and fees restricted.

No State or subgrantee may count tuition and fees collected from students toward meeting matching, cost sharing, or maintenance of effort requirements of a program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

INDIRECT COST RATES

§ 76.560 General indirect cost rates; exceptions.

(a) Appendices C-F to 34 CFR Part 74 include:

(1) A description of the difference between direct and indirect costs; and

(2) The principles for determining the general indirect cost rate that a State or subgrantee may use under some programs.

(b) Section 76.562 provides restrictions on indirect cost rates under certain programs.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.561 Approval of indirect cost rates.

(a) The Secretary approves an indirect cost rate for a State agency and for a subgrantee other than a local educational agency. For the purposes of this section, the term "local educational agency" does not include a State agency.

(b) Each State educational agency, on the basis of a plan approved by the Secretary, shall approve an indirect cost rate for each local educational agency that requests it to do so.

(c) Each indirect cost rate must be approved annually.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.563 Restricted indirect cost rate—programs covered.

If a State or a subgrantee decides to charge indirect costs to a program that has a statutory requirement prohibiting the use of Federal funds to supplant non-Federal funds, the State or subgrantee shall use a restricted indirect cost rate computed under 34 CFR 75.564-75.568.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[55 FR 14816, Apr. 18, 1990]

COORDINATION

§ 76.580 Coordination with other activities.

(a) A State and a subgrantee shall, to the extent possible, coordinate each of its projects with other activities that are in the same geographic area served by the project and that serve similar purposes and target groups.

(b) A State and a subgrantee whose project includes activities to improve the basic skills of children, youth, or adults shall, to the extent possible, coordinate its project with other basic skills activities that are in the same geographic area served by the project.

(c) For the purposes of this section, "basic skills" means reading, mathematics, and effective communication, both written and oral.

(d) The State or subgrantee shall continue its coordination during the period that it carries out the project.

(Authority: 20 U.S.C. 1221e-3(a)(1); 2890)

§ 76.581 Methods of coordination.

Depending on the objectives and requirements of a project, a grantee shall use one or more of the following methods of coordination:

(a) Planning the project with organizations and individuals who have similar objectives or concerns.

(b) Sharing information, facilities, staff, services, or other resources.

(c) Engaging in joint activities such as instruction, needs assessment evaluation, monitoring, technical assistance, or staff training.

(d) Using the grant or subgrant funds so as not to duplicate or counteract the effects of funds used under other programs.

(e) Using the grant or subgrant funds to increase the impact of funds made available under other programs.

(Authority: 20 U.S.C. 1221e-3(a)(1))

EVALUATION

§ 75.591 Federal evaluation—cooperation by a grantee.

A grantee shall cooperate in any evaluation of the program by the Secretary.

(Authority: 20 U.S.C. 1226c, 1231a, 2831(a), 3474)

[45 FR 86298, Dec. 30, 1980]

§ 76.592 Federal evaluation—satisfying requirement for State or subgrantee evaluation.

If a State or a subgrantee cooperates in a Federal evaluation of a program, the Secretary may determine that the State or subgrantee meets the evaluation requirements of the program.

(Authority: 20 U.S.C. 1226c; 1231a)

CONSTRUCTION

§ 76.600 Where to find construction regulations.

(a) A State or a subgrantee that requests program funds for construction, or whose grant or subgrant includes funds for construction, shall comply with the rules on construction that apply to applicants and grantees under 34 CFR 75.600-75.615.

(b) The State shall perform the functions that the Secretary performs under §§ 75.602 (Preservation of historic sites) and 75.605 (Approval of drawings and specifications) of this title.

(c) The State shall provide to the Secretary the information required under 34 CFR 75.602(a) (Preservation of historic sites).

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980]

PARTICIPATION OF STUDENTS ENROLLED IN PRIVATE SCHOOLS

§ 76.650 Private schools; purpose of §§ 76.651-76.662.

(a) Under some programs, the authorizing statute requires that a State and its subgrantees provide for participation by students enrolled in private schools. Sections 76.651-76.662 apply to those programs and provide rules for that participation. These sections do not affect the authority of the State or a subgrantee to enter into a contract with a private party.

(b) If any other rules for participation of students enrolled in private schools apply under a particular program, they are in the authorizing statute or implementing regulations for that program.

(Authority: 20 U.S.C. 1221e-3(a)(1)).

NOTE: Some program statutes authorize the Secretary—under certain circumstances—to provide benefits directly to private school students. These "bypass" provisions—where they apply—are implemented in the individual program regulations.

§ 76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each subgrantee complies with the requirements in §§76.651-76.662.

(2) If a State carries out a project directly, it shall comply with these requirements as if it were a subgrantee.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.652 Consultation with representatives of private school students.

(a) An applicant for a subgrant shall consult with appropriate representatives of students enrolled in private schools during all phases of the development and design of the project covered by the application, including consideration of:

(1) Which children will receive benefits under the project;

(2) How the children's needs will be identified;

(3) What benefits will be provided;

(4) How the benefits will be provided; and

(5) How the project will be evaluated.

(b) A subgrantee shall consult with appropriate representatives of students enrolled in private schools before the subgrantee makes any decision that affects the opportunities of those students to participate in the project.

(c) The applicant or subgrantee shall give the appropriate representatives a genuine opportunity to express their views regarding each matter subject to the consultation requirements in this section.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.653 Needs, number of students, and types of services.

A subgrantee shall determine the following matters on a basis comparable to that used by the subgrantee in providing for participation of public school students:

(a) The needs of students enrolled in private schools.

(b) The number of those students who will participate in a project.

(c) The benefits that the subgrantee will provide under the program to those students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.654 Benefits for private school students.

(a) *Comparable benefits.* The program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope, and opportunity for participation to the program benefits that the subgrantee provides for students enrolled in public schools.

(b) *Same Benefits.* If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall insure equitable opportunities for participation by students enrolled in private schools who:

(1) Have the same needs as the public school students to be served; and

(2) Are in that group, attendance area, or age or grade level.

(c) *Different benefits.* If the needs of students enrolled in private schools are different from the needs of students enrolled in public schools, a subgrantee shall provide program benefits for the private school students that are different from the benefits the subgrantee provides for the public school students.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.655 Level of expenditures for students enrolled in private schools.

(a) Subject to paragraph (b) of this section, a subgrantee shall spend the same average amount of program funds on:

(1) A student enrolled in a private school who receives benefits under the program; and

(2) A student enrolled in a public school who receives benefits under the program.

(b) The subgrantee shall spend a different average amount on program benefits for students enrolled in private schools if the average cost of meeting the needs of those students is different from the average cost of meeting the needs of students enrolled in public schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.656 Information in an application for a subgrant.

An applicant for a subgrant shall include the following information in its application:

(a) A description of how the applicant will meet the Federal requirements for participation of students enrolled in private schools.

(b) The number of students enrolled in private schools who have been identified as eligible to benefits under the program.

(c) The number of students enrolled in private schools who will receive benefits under the program.

(d) The basis the applicant used to select the students.

(e) The manner and extent to which the applicant complied with § 76.652 (consultation).

(f) The places and times that the students will receive benefits under the program.

(g) The differences, if any, between the program benefits the applicant will provide to public and private school students, and the reasons for the differences.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.657 Separate classes prohibited.

A subgrantee may not use program funds for classes that are organized separately on the basis of school enrollment or religion of the students if:

(a) The classes are at the same site; and

(b) The classes include students enrolled in public schools and students enrolled in private schools.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.658 Funds not to benefit a private school.

(a) A subgrantee may not use program funds to finance the existing level of instruction in a private school or to otherwise benefit the private school.

(b) The subgrantee shall use program funds to meet the specific needs of students enrolled in private schools, rather than:

(1) The needs of a private school; or

(2) The general needs of the students enrolled in a private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.659 Use of public school personnel.

A subgrantee may use program funds to make public personnel available in other than public facilities:

(a) To the extent necessary to provide equitable program benefits designed for students enrolled in a private school; and

(b) If those benefits are not normally provided by the private school.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.660 Use of private school personnel.

A subgrantee may use program funds to pay for the services of an employee of a private school if:

(a) The employee performs the services outside of his or her regular hours of duty; and

(b) The employee performs the services under public supervision and control.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.661 Equipment and supplies.

(a) Under some program statutes, a public agency must keep title to and exercise continuing administrative control of all equipment and supplies that the subgrantee acquires with program funds. This public agency is usually the subgrantee.

(b) The subgrantee may place equipment and supplies in a private school for the period of time needed for the project.

(c) The subgrantee shall insure that the equipment or supplies placed in a private school:

(1) Are used only for the purposes of the project; and

(2) Can be removed from the private school without remodeling the private school facilities.

(d) The subgrantee shall remove equipment or supplies from a private school if:

(1) The equipment or supplies are no longer needed for the purposes of the project; or

(2) Removal is necessary to avoid use of the equipment of supplies for other than project purposes.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.662 Construction.

A subgrantee shall insure that program funds are not used for the construction of private school facilities.

(Authority: 20 U.S.C. 1221e-3(a)(1))

OTHER REQUIREMENTS FOR CERTAIN PROGRAMS

CROSS-REFERENCE. See 34 CFR Part 74, Subpart C—Bonding and Insurance; and 34 CFR 74.144—Inventions and patents.

PROCEDURES FOR BYPASS

§ 76.670 Applicability.

The regulations in §§ 76.671 through 76.677 apply to the following programs under which the Secretary is authorized to waive the requirements for providing services to private school children and to implement a bypass:

CFDA number and name of program	Authorizing statute	Implementing regulations Title 34 CFR Part
84.010 Chapter 1 Program in Local Educational Agencies	Chapter 1, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2701 *et seq.*)	200
84.151 Federal, State, and Local Partnership for Educational Improvement	Chapter 2, Title I, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2911-2952, 2971-2976)	298
84.164 Mathematics and Science Education	Title II, Part A, Elementary and Secondary Education Act of 1965, as amended (20 U.S.C. 2981-2993)	208
84.186 State and Local Programs	Part B, Drug Free Schools and Communities Act of 1986 (20 U.S.C. 3191-3197)	None

(Authority: 20 U.S.C. 2727(b), 2972(d)-(e), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

§ 76.671 Notice by the Secretary.

(a) Before taking any final action to implement a bypass under a program listed in § 76.670, the Secretary provides the affected grantee and subgrantee, if appropriate, with written notice.

(b) In the written notice, the Secretary—

(1) States the reasons for the proposed bypass in sufficient detail to allow the grantee and subgrantee to respond;

(2) Cites the requirement that is the basis for the alleged failure to comply; and

(3) Advises the grantee and subgrantee that they—

(i) Have at least 45 days after receiving the written notice to submit written objections to the proposed bypass; and

(ii) May request in writing the opportunity for a hearing to show cause why the bypass should not be implemented.

(c) The Secretary sends the notice to the grantee and subgrantee by certified mail with return receipt requested.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21775, May 19, 1989]

§ 76.672 Bypass procedures.

Sections 76.673 through 76.675 contain the procedures that the Secretary uses in conducting a show cause hearing. The hearing officer may modify the procedures for a particular case if all parties agree the modification is appropriate.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.673 Appointment and functions of a hearing officer.

(a) If a grantee or subgrantee requests a hearing to show cause why the Secretary should not implement a bypass, the Secretary appoints a hearing officer and notifies appropriate representatives of the affected private school children that they may participate in the hearing.

(b) The hearing officer has no authority to require or conduct discovery or to rule on the validity of any statute or regulation.

(c) The hearing officer notifies the grantee, subgrantee, and representatives of the private school children of the time and place of the hearing.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.674 Hearing procedures.

(a) The following procedures apply to a show cause hearing regarding implementation of a bypass:

(1) The hearing officer arranges for a transcript to be taken.

(2) The grantee, subgrantee, and representatives of the private school children each may—

(i) Be represented by legal counsel; and

(ii) Submit oral or written evidence and arguments at the hearing.

(b) Within 10 days after the hearing, the hearing officer—

(1) Indicates that a decision will be issued on the basis of the existing record; or

(2) Requests further information from the grantee, subgrantee, representatives of the private school children, or Department officials.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.675 Posthearing procedures.

(a) (1) Within 120 days after the record of a show cause hearing is closed, the hearing officer issues a written decision on whether a bypass should be implemented.

(2) The hearing officer sends copies of the decision to the grantee, subgrantee, representatives of the private school children, and the Secretary.

(b) Within 30 days after receiving the hearing officer's decision, the grantee, subgrantee, and representatives of the private school children may each submit to the Secretary written comments on the decision.

(c) The Secretary may adopt, reverse, modify, or remand the hearing officer's decision.

(Authority: 20 U.S.C. 2727(b)(4)(A), 2972(h)(1), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.676 Judicial review of a bypass action.

If a grantee or subgrantee is dissatisfied with the Secretary's final action after a proceeding under §§ 76.672 through 76.675, it may, within 60 days after receiving notice of that action, file a petition for review with the United States Court of Appeals for the circuit in which the State is located.

(Authority: 20 U.S.C. 2727(b)(4)(B)-(D), 2972(h)(2)-(4), 2990(c), 3223(c))

[54 FR 21776, May 19, 1989]

§ 76.677 Continuation of a bypass.

The Secretary continues a bypass until the Secretary determines that the grantee or subgrantee will meet the requirements for providing services to private school children.

(Authority: 20 U.S.C. 2727(b)(3)(D), 2972(f), 1221e-3(a)(1))

[54 FR 21776, May 19, 1989]

§ 76.681 Protection of human research subjects.

If a State or a subgrantee uses a human subject in a research project, the State or subgrantee shall protect the person from physical, psychological, or social injury resulting from the project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.682 Treatment of animals.

If a State or a subgrantee uses an animal in a project, the State or subgrantee shall provide the animal with proper care and humane treatment in accordance with the Animal Welfare Act of 1970.

(Authority: Pub. L. 89-544, as amended)

§ 76.683 Health or safety standards for facilities.

A State and a subgrantee shall comply with any Federal health or safety requirements that apply to the facilities that the State or subgrantee uses for a project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.684 Day care services.

(a) If a State or a subgrantee uses program funds to provide any day care services, the State or subgrantee shall comply with the day care requirements in 45 CFR Part 71 of this title.

(b) The Secretary may waive this requirement by publication of a notice in the FEDERAL REGISTER.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.690 Energy conservation awareness.

To the extent that it is consistent with the statute and regulations for any program, the subgrantee shall consider incorporating into its program a component on energy awareness. This component may include study of the problems, solutions, and alternatives relating to the Nation's energy crisis.

(Authority: 42 U.S.C. 8373(b); E.O. No. 12185)

[45 FR 58013, Aug. 29, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980]

Subpart G—What Are the Administrative Responsibilities of the State and Its Subgrantees?

GENERAL ADMINISTRATIVE RESPONSIBILITIES

§ 76.700 Compliance with statutes, regulations, State plan, and applications.

A State and a subgrantee shall comply with the State plan and applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, plan, and applications.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.701 The State or subgrantee administers or supervises each project.

A State or a subgrantee shall directly administer or supervise the administration of each project.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.702 Fiscal control and fund accounting procedures.

A State and a subgrantee shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.703 When a State may begin to obligate funds.

(a) A State may not begin to obligate funds under a program until the later of the following two dates:

(1) The date that the State plan is mailed or hand delivered to the Secretary in substantially approvable form.

(2) The date that the funds are first available for obligation by the Secretary.

(b) (1) The State must show one of the following as proof of mailing:

(i) A legibly dated U.S. Postal Service postmark.

(ii) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(iii) A dated shipping label, invoice, or receipt from a commercial carrier.

(iv) Any other proof of mailing acceptable to the Secretary.

(2) If a State plan is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(i) A private metered postmark.

(ii) A mail receipt that is not dated by the U.S. Postal Service.

NOTE: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, a State should check with its local post office.

(c) After determining that a State plan is in substantially approvable form, the Secretary informs the State of the date on which it could begin to obligate funds. Reimbursement for those obligations is subject to final approval of the State plan.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.704 When certain subgrantees may begin to obligate funds.

(a) If the authorizing statute for a program requires a State to make subgrants on the basis of a formula (see § 76.5), the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:

(1) The date that the State may begin to obligate funds under § 76.703; or

(2) The date that the applicant submits its application to the State in substantially approvable form.

(b) Reimbursement for obligations under paragraph (a) of this section is subject to final approval of the application.

(c) If the authorizing statute for a program gives the State discretion to select subgrantees, the State may not authorize an applicant for a subgrant to obligate funds until the subgrant is made. However, the State may approve pre-agreement costs in accordance with the cost principles that are appended to 34 CFR Part 74 (Appendices C-F).

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

§ 76.705 Funds may be obligated during a "carryover period."

(a) If a State or a subgrantee does not obligate all of its grant or subgrant funds by the end of the fiscal year for which Congress appropriated the funds, it may obligate the remaining funds during a carryover period of one additional fiscal year.

(b) The State shall return to the Federal Government any carryover funds not obligated by the end of the carryover period by the State and its subgrantees.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: U.S.C. 1225(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.706 Obligations made during a carryover period are subject to current statutes, regulations, and applications.

A State and a subgrantee shall use carryover funds in accordance with:

(a) The Federal statutes and regulations that apply to the program and are in effect for the carryover period; and

(b) Any State plan, or application for a subgrant, that the State or subgrantee is required to submit for the carryover period.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1225(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

§ 76.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

If the obligation is for—	The obligation is made—
(a) Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property
(b) Personal services by an employee of the State or subgrantee	When the services are performed
(c) Personal services by a contractor who is not an employee of the State or subgrantee	On the date on which the State or subgrantee makes a binding written commitment to obtain the services
(d) Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work
(e) Public utility services	When the State or subgrantee receives the services
(f) Travel	When the travel is taken
(g) Rental of real or personal property	When the State or subgrantee uses the property
(h) A pre-agreement cost that was properly approved by the State	On the first day of the subgrant period

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 55 FR 14817, Apr. 18, 1990]

REPORTS

§ 76.720 Financial and performance reports by a State.

(a) This section applies to a State's reports required under 34 CFR Part 74, Subparts I (financial reporting) and J (performance reporting).

(b) A state shall submit these reports annually, unless the Secretary allows less frequent reporting.

(c) However, the Secretary may, under 34 CFR 74.7 (Special grant or subgrant conditions) or 34 CFR 74.72(e) (Grantee accounting systems), require a State to report more frequently than annually.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C., 1221e-3(a)(1), 2831(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.722 A subgrantee makes reports required by the State.

A State may require a subgrantee to furnish reports that the State needs to carry out its responsibilities under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

RECORDS

§ 76.730 Records related to grant funds.

A State and a subgrantee shall keep records that fully show:

(a) The amount of funds under the grant or subgrant;

(b) How the State or subgrantee uses the funds;

(c) The total cost of the project;

(d) The share of that cost provided from other sources; and

(e) Other records to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1232f)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.731 Records related to compliance.

A State and a subgrantee shall keep records to show its compliance with program requirements.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.734 Record retention period.

A State and a subgrantee shall retain records for five years after completion of the activity for which they use grant or subgrant funds.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1232f(a))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980; 55 FR 14816, Apr. 18, 1990]

PRIVACY

§ 76.740 Protection of and accessibility to student records.

Most records on present or past students are subject to the requirements of Section 438 of GEPA and its implementing regulations under 34 CFR Part 99. (Section 438 is the Family Educational Rights and Privacy Act of 1974.)

(Authority: 20 U.S.C. 1231g)

USE OF FUNDS BY STATES AND SUBGRANTEES

§ 76.760 More than one program may assist a single activity.

A State or a subgrantee may use funds under more than one program to support different parts of the same project if the State or subgrantee meets the following conditions:

(a) The State or subgrantee complies with the requirements of each program with respect to the part of the project assisted with funds under that program.

(b) The State or subgrantee has an accounting system that permits identification of the costs paid for under each program.

(Authority: 20 U.S.C. 1221e-3(a)(1)(d), 2831(a), 2974(b))

§ 76.761 Federal funds may pay 100 percent of cost.

A State or a subgrantee may use program funds to pay up to 100 percent of the cost of a project if:

(a) The State or subgrantee is not required to match the funds; and

(b) The project can be assisted under the authorizing statute and implementing regulations for the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

STATE ADMINISTRATIVE RESPONSIBILITIES

§ 76.770 A State shall perform certain duties with respect to the applications for subgrants.

With respect to each program that authorizes subgrants, a State shall perform the following duties and any other duties required by statute or regulations:

(a) Disseminate information regarding the availability of funds under each program.

(b) Develop procedures for applicants to follow in completing and submitting applications for subgrants.

(c) Provide application forms.

(d) Assist applicants in applying for funds.

(e) Review applications and, within the limits of available funds, award subgrants.

(f) Notify each applicant as to whether it will receive a subgrant.

(g) Not act in any manner that prevents eligible applicants from applying under the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.771 A State shall encourage eligible applicants to apply.

(a) Each State shall make a reasonable effort to encourage eligible applicants to apply for subgrants.

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(b) The State shall inform eligible applicants of:

(1) The availability of subgrants;

(2) The objectives of each program;

(3) The objectives of the State plan for each program;

(4) The assistance the State provides to an applicant in completing and submitting an application; and

(5) The procedures the State uses to select applications for funding.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1222c-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.772 Other responsibilities of the State.

(a) A State shall:

(1) Provide technical assistance to prospective applicants and subgrantees;

(2) Assist in the evaluation of projects;

(3) Develop and use procedures to monitor each project; and

(4) Develop procedures, issue rules, or take whatever action may be necessary to properly administer each program and to avoid illegal, imprudent, wasteful, or extravagant use of funds by the State or a subgrantee.

(b) This section applies to the program under Title IV of the Elementary and Secondary Education Act unless administrative funds for that program are appropriated under Title V-A of that Act.

(c) This section does not apply to the program under Title I of the Elementary and Secondary Education Act.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, as amended at 52 FR 27805, July 24, 1987]

COMPLAINT PROCEDURES OF THE STATE

§ 76.780 A State shall adopt complaint procedures.

(a) A State shall adopt written procedures for:

(1) Receiving and resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to a program;

(2) Reviewing an appeal from a decision of a subgrantee with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the State determines that an on-site investigation is necessary.

(b) Sections 76.780-76.782 apply to the program under Title IV of the Elementary and Secondary Education Act unless administrative funds for that program are appropriated under Title V-A of that Act.

(c) Sections 76.780-76.782 do not apply to the program under Title I of the Elementary and Secondary Education Act.

(Approved by the Office of Management and Budget under control number 1880-0513)

CROSS-REFERENCE. See § 76.1 Programs to which Part 76 applies.

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.781 Minimum complaint procedures.

A State shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after the State receives a complaint:

(1) If necessary, to carry out an independent on-site investigation; and

(2) To resolve the complaint.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the State.

(Approved by the Office of Management and Budget under control number 1880-0513)

(Authority: 20 U.S.C. 1221e-3(a)(1))

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 53 FR 49143, Dec. 6, 1988]

§ 76.782 An organization or individual may file a complaint.

An organization or individual may file a written signed complaint with a State. The complaint must include:

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(a) A statement that the State or a subgrantee has violated a requirement of a Federal statute or regulations that apply to a program; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.783 State educational agency action—subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

(1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or

(2) Terminating further assistance for an approved project.

(b) The procedures in § 76.401(c)(2)-(7) apply to any request for a hearing under this section.

NOTE: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the day preceding the effective date of this Act." Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231b-2)

[45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

Subpart H—What Procedures Does the Secretary Use to Get Compliance?

§ 76.900 Waiver of regulations prohibited.

(a) No official, agent, or employee of ED may waive any regulation that applies to a Department program unless the regulation specifically provide that it may be waived.

(b) No act or failure to act by an official, agent, or employee of ED can affect the authority of the Secretary to enforce regulations.

(Authority: 43 Dec. Comp. Gen. 31(1963))

§ 76.901 Education Appeal Board.

(a) The Education Appeal Board, established under Part E of GEPA, has the following functions:

(1) Audit appeal hearings under Section 452 of GEPA.

(2) Withholding and termination hearings under Section 453 of GEPA.

(3) Cease and desist hearings under Section 453 of GEPA.

(4) Any other proceeding designated by the Secretary.

(b) The regulations for the Education Appeal Board are in 34 CFR Part 78.

(Authority: 20 U.S.C. 1234)

§ 76.902 Judicial review.

After a hearing by the Secretary, a State is usually entitled—generally by the statute that required the hearing—to judicial review of the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a))

§ 76.910 Cooperation with audits.

A grantee or subgrantee shall cooperate with the Secretary and the Comptroller General of the United States or any of their authorized representatives in the conduct of audits authorized by Federal law. This cooperation includes access without unreasonable restrictions to records and personnel of the grantee or subgrantee for the purpose of obtaining relevant information.

(Authority: 5 U.S.C. Appendix 3, Sections 4(a)(1), 4(b)(1)(A), and 6(a)(1); 20 U.S.C. 1221e-3(a)(1), 1232f)

[54 FR 21776, May 19, 1989]

PART 77—DEFINITIONS THAT APPLY TO DEPARTMENT REGULATIONS

§ 77.1 Definitions that apply to all Department programs.

(a) [Reserved]

(b) Unless a statute or regulation provides otherwise, the following definitions in Part 74 of this title apply to the regulations in Title 34 of the Code of Federal Regulations. The section of Part 74 that contains the definition is given in parentheses.

Budget (74.104)
Contract (includes definition of "Subcontract") (74.3)
Equipment (74.132)
Federally recognized Indian tribal government (74.3)
Grant (74.3)
Grantee (74.3)
Local government (74.3)
Personal property (74.132)
Real property (74.132)
Recipient (74.3)
Subgrant (74.3)
Subgrantee (74.3)
Supplies (74.132)

(c) Unless a statute or regulation provides otherwise, the following definitions also apply to the regulations in this title:

Acquisition means taking ownership of property, receiving the property as a gift, entering into a lease-purchase arrangement, or leasing the property. The term includes processing, delivery, and installation of property.

Applicant means a party requesting a grant or subgrant under a program of the Department.

Application means a request for a grant or subgrant under a program of the Department.

Award means an amount of funds that the Department provides under a grant or contract.

Budget period means an interval of time into which a project period is divided for budgetary purposes.

Department means the U.S. Department of Education.

Director of the Institute of Musuem Services means the Director of the Institute of Museum Services or an officer or employee of the Institute of Museum Services acting for the Director under a delegation of authority.

Director of the National Institute of Education means the Director of the National Institute of Education or an officer or employee of the National Institute of Education acting for the Director under a delegation of authority.

ED means the U.S. Department of Education.

EDGAR means the Education Department General Administrative Regulations (34 CFR Parts 74, 75, 76, 77, and 78).

Elementary school means a day or residential school that provides elementary education, as determined under State law.

Facilities means one or more structures in one or more locations.

Fiscal year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30.

GEPA means The General Education Provisions Act.

Grant period means the period for which funds have been awarded.

Local educational agency means:

(a) A public board of education or other public authority legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in:

(1) A city, county, township, school district, or other political subdivision of a State; or

(2) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(b) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school.

(c) As used in 34 CFR Parts 400, 408, 525, 526 and 527 (vocational education programs), the term also includes any other public institution or agency that has administrative control and direction of a vocational education program.

Minor remodeling means minor alterations in a previously completed building. The term also includes the extension of utility lines, such as water and electricity, from points beyond the confines of the space in which the minor remodeling is undertaken but within the confines of the previously completed building. The term does not include building construction, stuctural alterations to buildings, building maintenance, or repairs.

Nonprofit, as applied to an agency, organization, or institution, means that it is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity.

Nonpublic, as applied to an agency, organization, or institution, means that the agency, organization, or institution is nonprofit and is not under Federal or public supervision or control.

Preschool means the educational level from a child's birth to the time at which the State provides elementary education.

Private, as applied to an agency, organization, or institution, means that it is not under Federal or public supervision or control.

Project means the activity described in an application.

Project period means the period for which the appropriate official of the Department approves a project.

Public, as applied to an agency, organization, or institution, means that the agency, organization, or institution is under the administrative supervision or control of a government other than the Federal Government.

Secondary school means a day or residential school that provides secondary education as determined under State law. In the absence of State law, the Secretary may determine, with respect to that State, whether the term includes education beyond the twelfth grade.

Secretary means the Secretary of the Department of Education or an official or employee of the Department acting for the Secretary under a delegation of authority.

Service function, with respect to a local educational agency:

(a) Means an educational service that is performed by a legal entity—such as an intermediate agency:

(1) (i) Whose jurisdiction does not extend to the whole State; and

(ii) That is authorized to provide consultative, advisory, or educational services to public elementary or secondary schools; or

(2) That has regulatory functions over agencies having administrative control or direction of public elementary or secondary schools.

(b) The term does not include a service that is performed by a cultural or educational resource.

State means any of the 50 States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

State educational agency means the State board of education or other agency or officer primarily responsible for the supervision of public elementary and secondary schools in a State. In the absence of this officer or agency, it is an officer or agency designated by the Governor or State law.

Work of art means an item that is incorporated into facilities primarily because of its aesthetic value.

(Authority: 20 U.S.C. 1221e-3(a)(1), 2831(a), 2974(b), and 3474)

[45 FR 22529, Apr. 3, 1980, as amended at 45 FR 37442, June 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86298, Dec. 30, 1980; 54 FR 21776, May 19, 1989]

PART 78—EDUCATION APPEAL BOARD

Subpart A—General

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78.1 Purpose.
78.2 Jurisdiction.
78.3 Definitions.
78.4 Board membership.
78.5 Panels.
78.6 Eligibility for review.
78.7 Exhaustion of remedies.

Subpart B—Final Audit Determination

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78.11 Written notice of a final audit determination.
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APPLICATION FOR REVIEW

78.13 Filing an application for review.
78.14 Acceptance of the application for review.
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78.16 Burden of proof.

Subpart C—Withholding, Termination, Voiding, and Other Cost Determinations

WRITTEN NOTICE

78.21 Written notice of an intent to withhold or terminate funds, void a grant, or of other cost determinations.

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§ 79.13 [Reserved]

PART 80—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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80.1 Purpose and scope of this part.
80.2 Scope of subpart.
80.3 Definitions.
80.4 Applicability.
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80.6 Additions and exceptions.

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80.10 Forms of applying for grants.
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80.31 Real property.
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80.34 Copyrights.
80.35 Subawards to debarred and suspended parties.
80.36 Procurement.
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REPORTS, RECORDS RETENTION, AND ENFORCEMENT

80.40 Monitoring and reporting program performance.
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80.42 Retention and access requirements for records.
80.43 Enforcement.
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Subpart D—After-the-Grant Requirements

80.50 Closeout.
80.51 Later disallowances and adjustments.
80.52 Collections of amounts due.

Subpart E—Entitlements [Reserved]

APPENDIX TO PART 80—AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

AUTHORITY: 20 U.S.C. 3474; OMB Circular A—102, unless otherwise noted.

SOURCE: 53 FR 8071 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§ 80.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from "*programmatic*" requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for "*grant*" and "*subgrant*" in this section and except where qualified by "*Federal*") a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the United States Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

(1) The definition of "State" in this section is used for the purpose of determining the scope of Part 80 regulations. Some program regulations contain different definitions for "State" based on program statute eligibility requirements.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of "*grant*" in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than "*equipment*" as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. "*Termination*" does not include: (1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period; (2) Withdrawal of the unobligated balance as of the expiration of a grant; (3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.4 Applicability.

(a) *General.* Subparts A through D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 80.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance; States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 80.4(a) (3) through (8) are subject to Subpart E.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 80.6.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.6 Additions and exceptions.

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by the Secretary after consultation with OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

Subpart B—Pre-Award Requirements

§ 80.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF-424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 80.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to:

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such property and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR Part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 80.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) For each kind of organization, there is a set of Federal principles for determining allowable costs. For the costs of a State, local, or Indian tribal government, the Secretary applies the cost principles in OMB Circular A-87, as amended on June 9, 1987.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OMB Circular A-122.
Educational institutions	OMB Circular A-21.
For-profit organization other than a hospital and an organization named in OBM Circular A-122 as not subject to that circular.	48 CFR Part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.23 Period of availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulation) to coincide with the submission of the annual Financial Status Report (SF-269). The Federal agency may extend this deadline at the request of the grantee.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions*—(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 80.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 80.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use allowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § 80.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 80.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 80.31 and 80.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private forprofit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local govenments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have

access to the records and financial statements.

(c) *Auditor selection*. In arranging for audit services, § 80.36 shall be followed.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

NOTE: The requirements for non-Federal audits are contained in the Appendix to Part 80—Audit Requirements for State and Local Governments.

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

CHANGES, PROPERTY, AND SUBAWARDS

§ 80.30 Changes.

(a) *General*. Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles*. The applicable cost principles (see § 80.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even if paragraphs (c) through (f) of this section do not.

(c) *Budget changes*—(1) *Nonconstruction projects*. Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects*. Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects*. When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes*. Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 80.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements*. The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval*. (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 80.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

(Approved by the Office of Management and Budget under control number 1880-0517)

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.31 Real property.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use*. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition*. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title*. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property*. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title*. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

(d) The provisions of paragraph (c) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988]

§ 80.32 Equipment.

(a) *Title*. Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States*. A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 80.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property, percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow § 80.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

(h) The provisions of paragraphs (c), (d), (e), and (g) of this section do not apply to disaster assistance under 20 U.S.C. 241-1(b)-(c) and the construction provisions of the Impact Aid Program, 20 U.S.C. 631-647.

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

§ 80.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms,

conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only:

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 80.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(d) *Methods of procurement to be followed*—(1) *Procurement by small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in § 80.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the

award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 80.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solication has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this seciton; or

(ii) The procurement is expected to exceed $25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed $25,000, specifies a "brand name" product; or

(iv) The proposed award over $25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than $25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subconstracts exceeding $100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (Contracts other than small purchases).

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement (All contracts in excess of $10,000).

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees).

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR Part 3) (All contracts and subgrants for construction or repair).

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR Part 5) (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation).

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15) (Contracts, subcontracts, and subgrants of amounts in excess of $100,000).

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

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§ 80.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 80.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 80.10;

(2) Section 80.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR Part 205, cited in § 80.21; and

(4) Section 80.50.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

REPORTS, RECORDS, RETENTION, AND ENFORCEMENT

§ 80.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semiannual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.41 Financial reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 80.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its ac-

counting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 80.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) *Grants that support construction activities paid by reimbursement method.* Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 80.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 80.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any

necessary special instruction. However, frequency and due date shall be governed by § 80.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 80.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 80.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 80.41(b)(2).

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 80.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(4) A recipient that receives funds under a program subject to 20 U.S.C. 1232f (section 437 of the General Education Provisions Act) shall retain records for a minimum of five years after the starting date specified in paragraph (c) of this section.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 8072, Mar. 11, 1988; 53 FR 49143, Dec. 6, 1988]

§ 80.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 80.35).

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.44 Termination for convenience.

Except as provided in § 80.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 80.43 or paragraph (a) of this section.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

Subpart D—After-the-Grant Requirements

§ 80.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable).*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:* In accordance with § 80.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

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(Authority: 20 U.S.C. 3474; OMB Circular A-102)

[53 FR 8071 and 8087, Mar. 11, 1988, as amended at 53 FR 49143, Dec. 6, 1988]

§ 80.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 80.42;

(d) Property management requirements in §§ 80.31 and 80.32; and

(e) Audit requirements in § 80.26.

(Authority: 20 U.S.C. 3474; OMB Circular A-102)

§ 80.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlement [Reserved]

APPENDIX TO PART 80—AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENTS

1. *Purpose.* This appendix is issued pursuant to the Single Audit Act of 1984, Pub. L. 98-502. It establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

2. *Policy.* The Single Audit Act requires the following:

a. State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this appendix.

b. State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this appendix, or in accordance with Federal laws and regulations governing the programs they participate in.

c. State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

d. Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law, including 34 CFR Part 74.

3. *Definitions.* For the purposes of this appendix the following definitions from the Single Audit Act apply:

a. "Cognizant agency" means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 9 of this appendix.

b. "Federal financial assistance" means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

c. "Federal agency" has the same meaning as the term "agency" in section 551(1) of Title 5, Unitied States Code.

d. "Generally accepted accounting principles" has the meaning specified in the generally accepted government adulting standards.

e. "Generally accepted government auditing standards" means the *Standards For Audits of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

f. "Independent auditor" means"

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

g. "Internal controls" means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resources use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, fairly disclosed in reports.

h. "Indian tribe" means any Indian tribe, band , nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

i. "Local government" means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

j. "Major Federal Assistance Program," as defined by Pub. L. 98-502, is described in the Attachment to this appendix.

k. "Public accountants" means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

l. "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has government functions and any Indian tribe.

m. "Subrecipient" means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

4. *Scope of audit.* The Single Audit Act provides that:

a. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

b. The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

c. Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this appendix. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of 34 CFR Part 74.

d. The auditor shall determine whether.

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

5. *Frequency of audit.* Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

6. *Internal control and compliance reviews.* The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

a. *Internal control review.* In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

b. *Compliance review.* The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under

which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expeditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections, program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(a) In making the test of transactions, the auditor shall determine whether:

- The amounts reported as expenditures were for allowable services, and
- The records show that those who received services services or benefits were eligible to receive them.

(b) In addition to transaction testing, the auditor shall determine whether:

- Matching requirements, levels of effort and earmarking limitations were met,
- Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and
- Amounts claimed or used for matching were determined in accordance with 34 CFR Part 74, Appendix C "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments," and 34 CFR Part 74, Subpart G, "Cost Sharing or Matching."

(c) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments*, issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by researching the statues, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

7. *Subrecipients.* State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

a. determine whether State or local subrecipients have met the audit requirements of this appendix and whether subrecipients covered by 34 CFR Part 74 have met the requirements of that part.

b. determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this appendix, 34 CFR Part 74, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

c. ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

d. consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

e. require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this appendix.

8. *Relation to other audit requirements.* The Single Audit Act provides that an audit made in accordance with this appendix shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

a. The provisions of this appendix do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

b. The provisions of this appendix do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

c. A Federal agency that makes or contracts for audits in addition to the audits made by recipients pursuant to this appendix shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

9. *Cognizant agency responsibilities.* The Single Audit Act provides for cognizant Federal agencies to oversee the implementation of this appendix.

a. The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizant responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

b. A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this appendix.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, or any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this appendix. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective action is not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for follow-up action. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this appendix, so that the additional audits build upon such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

10. *Illegal acts or irregularities.* If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also paragraph 11(a)(3) below for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

11. *Audit Reports.* Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

a. The audit report shall state that the audit was made in accordance with the provisions of this appendix. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance, the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assistance program as identified in the *Catalog of Federal Domestic Assistance*. Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The auditor's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

- A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;
- Negative assurance on those items not tested;
- A summary of all instances of noncompliance; and
- An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

b. The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

c. All fraud abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with paragraph 11f.

d. In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

e. The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

f. In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

g. Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

h. Recipients shall keep audit reports on file for three years from their issuance.

12. *Audit Resolution.* As provided in paragraph 9, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

13. *Audit workpapers and reports.* Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extent the retention period. Audit workpapers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

14. *Audit Costs.* The cost of audits made in accordance with the provisions of this appendix are allowable charges to Federal assistance programs.

a. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provisions of 34 CFR Part 74, Appendix C, "Principles for Determining Costs Applicable to Grants and Contracts with State and Local Governments.'

b. Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

15. *Sanctions.* The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this appendix. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

—Withholding a percentage of assistance payments until the audit is completed satisfactorily,

—Withholding or disallowing overhead costs, and

—Suspending the Federal assistance agreement until the audit is made.

16. *Auditor Selection.* In arranging for audit services State and local governments shall follow the procurement standards prescribed by 34 CFR Part 74, Subpart P, "Procurement Standards." The standards provide that while recipients are encouraged to enter into intergovermental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

17. *Small and Minority Audit Firms.* Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this appendix. Recipients of Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

d. Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small audit firms as described in paragraph (a) above when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration, in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

ATTACHMENT TO APPENDIX

Definition of Major Program as Provided in Pub. L. 98-502

"Major Federal Assistance Program," for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $300,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
More than	But less than	
$100 million	$1 billion	$3 million
$1 billion	$2 billion	$4 million
$2 billion	$3 billion	$7 million
$3 billion	$4 billion	$10 million
$4 billion	$5 billion	$13 million
$5 billion	$6 billion	$16 million
$6 billion	$7 billion	$19 million
Over $7 billion		$20 million

[50 FR 37358, Sept. 13, 1985. Redesignated at 53 FR 8072, Mar. 11, 1988]

PART 81—GENERAL EDUCATION PROVISIONS ACT—ENFORCEMENT

Subpart A—General Provisions

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APPENDIX TO PART 81—ILLUSTRATIONS OF PROPORTIONALITY

AUTHORITY: 20 U.S.C. 1221e-3(a)(1), 1234-1234i, 3474(a), unless otherwise noted.

SOURCE: 54 FR 19512, May 5, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 81.1 Purpose.

The regulations in this part govern the enforcement of legal requirements under applicable programs administered by the Department of Education and implement Part E of the General Education Provisions Act (GEPA).

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.2 Definitions.

The following definitions apply to the terms used in this part:

Administrative Law Judge (ALJ) means a judge appointed by the Secretary in accordance with section 451 (b) and (c) of GEPA.

Applicable program means any program for which the Secretary of Education has administrative responsibility, except a program authorized by—

(a) The Higher Education Act of 1965, as amended;

(b) The Act of September 30, 1950 (Pub. L. 874, 81st Congress), as amended; or

(c) The Act of September 23, 1950 (Pub. L. 815, 81st Congress), as amended.

Department means the United States Department of Education.

Disallowance decision means the decision of an authorized Departmental official that a recipient must return funds because it made an expenditure of funds that was not allowable or otherwise failed to discharge its obligation to account properly for funds. Such a decision, referred to as a "preliminary departmental decision" in section 452 of GEPA, is subject to review by the Office of Administrative Law Judges.

Party means either of the following:

(a) A recipient that appeals a decision.

(b) An authorized Departmental official who issues a decision that is appealed.

Recipient means the recipient of a grant or cooperative agreement under an applicable program.

Secretary means the United States Secretary of Education.

(Authority: 20 U.S.C. 1221e-3(a)(1); 1234 (b), (c), and (f)(1); 1234a(a)(1); 1234i; 3474(a))

§ 81.3 Jurisdiction of the Office of Administrative Law Judges.

(a) The Office of Administrative Law Judges (OALJ) established under section 451(a) of GEPA has jurisdiction to conduct the following proceedings concerning an applicable program:

(1) Hearings for recovery of funds.

(2) Withholding hearings.

(3) Cease and desist hearings.

(b) The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the FEDERAL REGISTER.

(Authority: 5 U.S.C. 554, 20 U.S.C. 1234(a))

§ 81.4 Membership and assignment to cases.

(a) The Secretary appoints Administrative Law Judges as members of the OALJ.

(b) The Secretary appoints one of the members of the OALJ to be the chief judge. The chief judge is responsible for the efficient and effective administration of the OALJ.

(c) The chief judge assigns an ALJ to each case or class of cases within the jurisdiction of the OALJ.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234 (b) and (c), 3474(a))

§ 81.5 Authority and responsibility of an Administrative Law Judge.

(a) An ALJ assigned to a case conducts a hearing on the record. The ALJ regulates the course of the proceedings and the conduct of the parties to ensure a fair, expeditious, and economical resolution of the case in accordance with applicable law.

(b) An ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(c) An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case.

(d)(1) An ALJ may disqualify himself or herself at any time on the basis of the standards in paragraph (c) of this section.

(2) A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the disqualification

matter before proceeding further with the case.

(Authority: 5 U.S.C. 556(b); 20 U.S.C. 1221e-3(a)(1); 1234(d), (f)(1), and (g)(1); 3474(a))

§ 81.6 Hearing on the record.

(a) A hearing on the record is a process for the orderly presentation of evidence and arguments by the parties.

(b) Except as otherwise provided in this part or in a notice of designation under § 81.3(b), an ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) At a party's request, the ALJ shall confer with the parties in person or by conference telephone call before determining whether an evidentiary hearing or an oral argument is needed.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.7 Non-party participation.

(a) A person or organization, other than a party, that wishes to participate in a case shall file an application to participate with the ALJ assigned to the case. The application must—

(1) Identify the case in which participation is sought;

(2) State how the applicant's interest relates to the case;

(3) State how the applicant's participation would aid in the disposition of the case; and

(4) State how the applicant seeks to participate.

(b) The ALJ may permit an applicant to participate if the ALJ determines that the applicant's participation—

(1) Will aid in the disposition of the case;

(2) Will not unduly delay the proceedings; and

(3) Will not prejudice the adjudication of the parties' rights.

(c) If the ALJ permits an applicant to participate, the ALJ permits the applicant to file briefs.

(d) (1) In addition to the participation described in paragraph (c) of this section, the ALJ may permit the applicant to participate in any or all of the following ways:

(i) Submit documentary evidence.

(ii) Participate in an evidentiary hearing afforded the parties.

(iii) Participate in an oral argument afforded the parties.

(2) The ALJ may place appropriate limits on an applicant's participation to ensure the efficient conduct of the proceedings.

(e) A non-party participant shall comply with the requirements for parties in § 81.11 and § 81.12.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.8 Representation.

A party to, or other participant in, a case may be represented by counsel.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.9 Location of proceedings.

(a) An ALJ may hold conferences of the parties in person or by conference telephone call.

(b) Any conference, hearing, argument, or other proceeding at which the parties are required to appear in person is held in the Washington, DC metropolitan area unless the ALJ determines that the convenience and necessity of the parties or their representatives requires that it be held elsewhere.

(Authority: 5 U.S.C. 554(b); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.10 Ex parte communications.

A party to, or other participant in, a case may not communicate with an ALJ on any fact in issue in the case or on any matter relevant to the merits of the case unless the parties are given notice and an opportunity to participate.

(Authority: 5 U.S.C. 554(d)(1), 557(d)(1)(A); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.11 Motions.

(a) To obtain an order or a ruling from an ALJ, a party shall make a motion to the ALJ.

(b) Except for a request for an extension of time, a motion must be made in writing unless the parties appear in person or participate in a conference telephone call. The ALJ may require a party to reduce an oral motion to writing.

(c) If a party files a motion, the party shall serve a copy of the motion on the other party on the filing date by hand-delivery or by mail.

(d) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(e) The date of service of a motion is determined by the standards for determining a filing date in § 81.12(d).

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.12 Filing requirements.

(a) Any written submission to an ALJ or the OALJ under this part must be filed by hand-delivery or by mail.

(b) If a party files a brief or other document with an ALJ or the OALJ, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail.

(c) Any written submission to an ALJ or the OALJ must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d) (1) The filing date for a written submission to an ALJ or the OALJ is either—

(i) The date of hand-delivery; or

(ii) The date of mailing.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next business day.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.13 Mediation.

(a) Voluntary mediation is available for proceedings that are pending before the OALJ.

(b) A mediator must be independent of, and agreed to by, the parties to the case.

(c) A party may request mediation by filing a motion with the ALJ assigned to the case. The OALJ arranges for a mediator if the parties to the case agree to mediation.

(d) A party may terminate mediation at any time. Mediation is limited to 120 days unless the mediator informs the ALJ that—

(1) The parties are likely to resolve some or all of the dispute; and

(2) An extension of time will facilitate an agreement.

(e) The ALJ stays the proceedings during mediation.

(f) (1) Evidence of conduct or statements made during mediation is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during mediation.

(2) A mediator may not disclose, in any proceeding under this part, information acquired as a part of his or her official mediation duties that relates to any fact in issue in the case or any matter relevant to the merits of the case.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1) and (h), 3474(a))

§ 81.14 Settlement negotiations.

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or the approval of a settlement agreement, the ALJ grants the stay.

(b) Evidence of conduct or statements made during settlement negotiations is not admissible in any proceeding under this part. However, evidence that is otherwise discoverable may not be excluded merely because it was presented during settlement negotiations.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 554(c)(1), 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.15 Evidence.

(a) The Federal Rules of Evidence do not apply to proceedings under this part. However, the ALJ accepts only evidence that is—

(1) Relevant;

(2) Material;

(3) Not unduly repetitious; and

(4) Not inadmissible under § 81.13 or § 81.14.

(b) The ALJ may take official notice of facts that are generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(Authority: 5 U.S.C. 556 (d) and (e); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.16 Discovery.

(a) The parties to a case are encouraged to exchange relevant documents and information voluntarily.

(b) The ALJ, at a party's request, may order compulsory discovery described in paragraph (c) of this section if the ALJ determines that—

(1) The order is necessary to secure a fair, expeditious, and economical resolution of the case;

(2) The discovery requested is likely to elicit relevant information with respect to an issue in the case;

(3) The discovery request was not made primarily for the purposes of delay or harassment; and

(4) The order would serve the ends of justice.

(c) If a compulsory discovery is permissible under paragraph (b) of this section, the ALJ may order a party to do one or more of the following:

(1) Make relevant documents available for inspection and copying by the party making the request.

(2) Answer written interrogatories that inquire into relevant matters.

(3) Have depositions taken.

(d) The ALJ may issue a subpoena to enforce an order described in this section and may apply to the appropriate court of the United States to enforce the subpoena.

(e) The ALJ may not compel the discovery of information that is legally privileged.

(f) (1) The ALJ limits the period for discovery to not more than 90 days but may grant an extension for good cause.

(2) At a party's request, the ALJ may set a specific schedule for discovery.

(Authority: 20 U.S.C. 1234(f)(1) and (g))

§ 81.17 Privileges.

The privilege of a person or governmental organization not to produce documents or provide information in a proceeding under this part is governed by the principles of common law as interpreted by the courts of the United States.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.18 The record.

(a) The ALJ arranges for any evidentiary hearing or oral argument to be recorded and transcribed and the transcript made available to the parties upon request at no charge.

(b) The record of a hearing on the record consists of—

(1) All papers filed in the proceeding;

(2) Documentary evidence admitted by the ALJ;

(3) The transcript of any evidentiary hearing or oral argument; and

(4) Rulings, orders, and subpoenas issued by the ALJ.

(Authority: 5 U.S.C. 556(e), 557(c); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.19 Costs and fees of parties.

The Equal Access to Justice Act, 5 U.S.C. 504, applies by its terms to proceedings under this part. Regulations under that statute are in 34 CFR Part 21.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f), 3474(a))

Subpart B—Hearings for Recovery of Funds

§ 81.20 Basis for recovery of funds.

(a) Subject to the provisions of § 81.21, an authorized Departmental official requires a recipient to return funds to the Department if—

(1) The recipient made an unallowable expenditure of funds under a grant or cooperative agreement; or

(2) The recipient otherwise failed to discharge its obligation to account properly for funds under a grant or cooperative agreement.

(b) An authorized Departmental official may base a decision to require a recipient to return funds upon an audit report, an investigative report, a monitoring report, or any other evidence.

(Authority: 20 U.S.C. 1234a(a) (1) and (2))

§ 81.21 Measure of recovery.

A recipient that made an unallowable expenditure or otherwise failed to discharge its obligation to account properly for funds shall return an amount that—

(a) Meets the standards for proportionality in § 81.22;

(b) In the case of a State or local educational agency, excludes any amount attributable to mitigating circumstances under the standards in § 81.23; and

(c) Excludes any amount expended in a manner not authorized by law more than five years before the recipient received the notice of a disallowance decision under § 81.24.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(k), 1234b (a) and (b), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

§ 81.22 Proportionality.

(a)(1) A recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement.

(2) An identifiable Federal interest under paragraph (a)(1) of this section includes, but is not limited to, the following:

(i) Serving only eligible beneficiaries.

(ii) Providing only authorized services or benefits.

(iii) Complying with expenditure requirements and conditions, such as set-aside, excess cost, maintenance of effort, comparability, supplement-not-supplant, and matching requirements.

(iv) Preserving the integrity of planning, application, recordkeeping, and reporting requirements.

(v) Maintaining accountability for the use of funds.

(b) The appendix to this part contains examples that illustrate how the standards for proportionality apply. The examples present hypothetical cases and do not represent interpretations of any actual program statute or regulation.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(a) and 3474(a))

§ 81.23 Mitigating circumstances.

(a) A recipient that is a State or local educational agency and that has made an unallowable expenditure or otherwise failed to account properly for funds is not required to return any amount that is attributable to the mitigating circumstances described in paragraph (b), (c), or (d) of this section.

(b) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by erroneous written guidance from the department. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The guidance was provided in response to a specific written request from the recipient that was submitted to the Department at the address provided by notice published in the Federal Register under this section;

(2) The guidance was provided by a Departmental official authorized to provide the guidance, as described by that notice;

(3) The recipient actually relied on the guidance as the basis for the conduct that constituted the violation; and

(4) The recipient's reliance on the guidance was reasonable.

(c) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the Department's failure to provide timely guidance. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient in good faith submitted a written request for guidance with respect to the legality of a proposed expenditure or practice;

(2) The request was submitted to the Department at the address provided by notice published in the Federal Register under this section;

(3) The request—

(i) Accurately described the proposed expenditure or practice; and

(ii) Included the facts necessary for the Department's determination of its legality;

(4) The request contained the certification of the chief legal officer of the appropriate State educational agency that the officer—

(i) Examined the proposed expenditure or practice; and

(ii) Believed it was permissible under State and Federal law applicable at the time of the certification;

(5) The recipient reasonably believed the proposed expenditure or practice was permissible under State and Federal law applicable at the time it submitted the request to the Department;

(6) No Departmental official authorized to provide the requested guidance responded to the request within 90 days of its receipt by the Department; and

(7) The recipient made the proposed expenditure or engaged in the proposed practice after the expiration of the 90-day period.

(d) Mitigating circumstances exist if it would be unjust to compel the recovery of funds because the recipient's violation was caused by the recipient's compliance with a judicial decree from a court of competent jurisdiction. To prove mitigating circumstances under this paragraph, the recipient shall prove that—

(1) The recipient was legally bound by the decree;

(2) The recipient actually relied on the decree when it engaged in the conduct that constituted the violation; and

(3) The recipient's reliance on the decree was reasonable.

(e) If a Departmental official authorized to provide the requested guidance responds to a request described in paragraph (c) of this section more than 90 days after its receipt, the recipient that made the request shall comply with the guidance at the earliest practicable time.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(b), 3474(a))

§ 81.24 Notice of a disallowance decision.

(a) If an authorized Departmental official decides that a recipient must return funds under § 81.20, the official gives the recipient written notice of a disallowance decision. The official sends the notice by certified mail, return receipt requested, or other means that ensure proof of receipt.

(b)(1) The notice must state a prima facie case for the recovery of funds.

(2) For the purpose of this section, a prima facie case is a statement of the law and the facts that, unless rebutted, is sufficient to sustain the conclusion drawn in the notice. The facts may be set out in the notice or in a document that is identified in the notice and available to the recipient.

(3) A statement that the recipient failed to maintain records required by law or failed to allow an authorized representative of the Secretary access to those records constitutes a prima facie case for the recovery of the funds affected.

(i) If the recipient failed to maintain records, the statement must briefly describe the types of records that were not maintained and identify the recordkeeping requirement that was violated.

(ii) If the recipient failed to allow access to records, the statement must briefly describe the recipient's actions that constituted the failure and identify the access requirement that was violated.

(c) The notice must inform the recipient that it may—

(1) Obtain a review of the disallowance decision by the OALJ; and

(2) Request mediation under § 81.13.

(d) The notice must describe—

(1) The time available to apply for a review of the disallowance decision; and

(2) The procedure for filing an application for review.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(a), 3474(a))

§ 81.25 Reduction of claims.

The Secretary or an authorized Departmental official as appropriate may, after the issuance of a disallowance decision, reduce the amount of a claim established under this subpart by—

(a) Redetermining the claim on the basis of the proper application of the law, including the standards for the measure of recovery under § 81.21, to the facts;

(b) Compromising the claim under the Federal Claims Collection Standards in 4 CFR Part 103; or

(c) Compromising the claim under § 81.26, if applicable.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(j), 3474(a); 31 U.S.C. 3711)

§ 81.26 Compromise of claims under General Education Provisions Act.

(a) The Secretary or an authorized Departmental official as appropriate may compromise a claim established under this subpart without following the procedures in 4 CFR Part 103 if—

(1) (i) The amount of the claim does not exceed $200,000; or

(ii) The difference between the amount of the claim and the amount agreed to be returned does not exceed $200,000; and

(2) The Secretary or the official determines that—

(i) The collection of the amount by which the claim is reduced under the compromise would not be practical or in the public interest; and

(ii) The practice that resulted in the disallowance decision has been corrected and will not recur.

(b) Not less than 45 days before compromising a claim under this section, the Department publishes a notice in the FEDERAL REGISTER stating—

(1) The intention to compromise the claim; and

(2) That interested persons may comment on the proposed compromise.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(j), 3474(a))

§ 81.27 Application for review of a disallowance decision.

(a) If a recipient wishes to obtain review of a disallowance decision, the recipient shall file a written application for review with the OALJ.

(b) A recipient shall file an application for review not later than 30 days after the date it receives the notice of a disallowance decision. Upon receipt of a copy of the filed material, the authorized Departmental official who made the disallowance decision provides the ALJ with a copy of any document identified in the notice under § 81.24(b)(2).

(c) An application for review must contain—

(1) A copy of the disallowance decision of which review is sought;

(2) A statement certifying the date the recipient received the notice of that decision;

(3) A short and plain statement of the disputed issues of law and fact, the recipient's position with respect to these issues, and the disallowed funds the recipient contends need not be returned; and

(4) A statement of the facts and the reasons that support the recipient's position.

(d) The ALJ who considers a timely application for review that substantially complies with the requirements of paragraph (c) of this section may permit the recipient to supplement or amend the application with respect to issues that were timely raised. Any requirement to return funds that is not timely appealed becomes the final decision of the Department.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(1), 3474(a))

§ 81.28 Consideration of an application for review.

(a) The ALJ assigned to the case under § 81.4 considers an application for review of a disallowance decision.

(b) The ALJ decides whether the notice of a disallowance decision meets the requirements of § 81.24, as provided by section 451(e) of GEPA.

(1) If the notice does not meet those requirements, the ALJ—

(i) Returns the notice, as expeditiously as possible, to the authorized Departmental official who made the disallowance decision;

(ii) Gives the official the reasons why the notice does not meet the requirements of § 81.24; and

(iii) Informs the recipient of the ALJ's decision by certified mail, return receipt requested.

(2) An authorized Departmental official may modify and reissue a notice that an ALJ returns.

(c) If the notice of a disallowance decision meets the requirements of § 81.24, the ALJ decides whether the application for review meets the requirements of § 81.27.

(1) If the application, including any supplements or amendments under § 81.27(d), does not meet those requirements, the disallowance decision becomes the final decision of the Department.

(2) If the application meets those requirements, the ALJ—

(i) Informs the recipient and the authorized Departmental official that the OALJ has accepted jurisdiction of the case; and

(ii) Schedules a hearing on the record.

(3) The ALJ informs the recipient of the disposition of its application for review by certified mail, return receipt requested. If the ALJ decides that the application does not meet the requirements of § 81.27, the ALJ informs the recipient of the reasons for the decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(e) and (f)(1), 1234a(b), 3474(a))

§ 81.29 Submission of evidence.

(a) The ALJ schedules the submission of the evidence, whether oral or documentary, to occur within 90 days of the OALJ's receipt of an acceptable application for review under § 81.27.

(b) The ALJ may waive the 90-day requirement for good cause.

(Authority: 5 U.S.C. 556(d); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(c), 3474(a))

§ 81.30 Burden of proof.

If the OALJ accepts jurisdiction of a case under § 81.28, the recipient shall present its case first and shall have the burden of proving that the recipient is not required to return the amount of funds that the disallowance decision requires to be returned because—

(a) An expenditure identified in the disallowance decision as unallowable was allowable;

(b) The recipient discharged its obligation to account properly for the funds;

(c) The amount required to be returned does not meet the standards for proportionality in § 81.22;

(d) The amount required to be returned includes an amount attributable to mitigating circumstances under the standards in § 81.23; or

(e) The amount required to be returned includes an amount expended in a manner not authorized by law more than five years before the recipient received the notice of the disallowance decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(b)(3), 1234b(b)(1), 3474(a))

§ 81.31 Initial decision.

(a) The ALJ makes an initial decision based on the record.

(b) The initial decision includes the ALJ's findings of fact, conclusions of law, and reasoning on all material issues.

(c) On the day the ALJ makes the initial decision, the ALJ—

(1) Sends the initial decision to the Secretary; and

(2) Sends the initial decision to each of the parties by hand-delivery or by certified mail, return receipt requested.

(d) For the purpose of this part, "initial decision" includes an ALJ's modified decision after the Secretary's remand of a case.

(Authority: 5 U.S.C. 557(c); 20 U.S.C 1221e-3(a)(1), 1234(f)(1), 3474(a))

§ 81.32 Petition for review of an initial decision.

(a) If a party wishes to obtain the Secretary's review of the initial decision of an ALJ, the party files a petition for review with the OALJ, which sends the petition to the Secretary.

(b) A party shall file a petition for review not later than 30 days after the date it receives the initial decision. The party shall file its petition by hand-delivery or by overnight or express mail.

(c) If a party files a petition for review, the party shall serve a copy of the petition on the other party on the filing date by hand-delivery or by overnight or express mail.

(d) A petition for review must contain—

(1) The identity of the initial decision of which review is sought; and

(2) A statement of the reasons asserted by the party for affirming the initial decision, modifying it, or setting it aside in whole or in part.

(e) (1) A party may respond to a petition for review by filing a statement of its views on the issues raised in the petition with the OALJ not later than 15 days after the date it receives the petition. The OALJ sends the statement to the Secretary.

(2) A party shall serve a copy of its statement of views on the other party on the filing date by hand-delivery or by overnight or express mail.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(e), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21726, May 19, 1989]

§ 81.33 Review by the Secretary.

(a) The Secretary reviews the initial decision of an ALJ on the petition of a party under § 81.32. An interlocutory decision of an ALJ is not subject to review except as a part of a review of the ALJ's initial decision.

(b) The Secretary's review of an initial decision is based on the record of the case, the initial decision, and any proper submissions of the parties or other participants in the case filed during the review process.

(c) (1) The ALJ's findings of fact, if supported by substantial evidence, are conclusive.

(2) The Secretary, for good cause, may remand the case to the ALJ to take further evidence. The ALJ may make new or modified findings of fact and may modify the initial decision. The new or modified findings, if supported by substantial evidence, are conclusive.

(3) A party may not introduce new evidence after an initial decision unless the Secretary determines that extraordinary circumstances made the introduction of the evidence during the proceeding before the ALJ impossible. If the Secretary permits the introduction of new evidence, the Secretary remands the case to the ALJ.

(d) The Secretary, for good cause, may remand the case to the ALJ for further briefing or for clarification or revision of the initial decision.

(e) (1) If the Secretary modifies or sets aside an initial decision, in whole or in part, the Secretary's decision includes a statement of the reasons that support it.

(2) The Secretary gives a decision to modify, remand, or set aside to the OALJ, which sends the decision to each of the parties by hand-delivery or by mail. If the decision is mailed, the OALJ sends it certified mail, return receipt requested.

(Authority: 5 U.S.C. 557(b); 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(d), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21726, May 19, 1989]

§ 81.34 Final decision of the Department.

(a) The ALJ's initial decision becomes the final decision of the Department 60 days after the recipient receives the ALJ's decision unless the Secretary modifies, sets aside, or remands the decision during the 60-day period.

(b) If the Secretary modifies or sets aside the ALJ's initial decision, the Secretary's decision becomes the final decision of the Department on the date the recipient receives the Secretary's decision.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234a(g), 3474(a))

§ 81.35 Collection of claims.

(a) An authorized Departmental official collects a claim established under this subpart by using the standards and procedures in 34 CFR Part 30.

(b) A claim established under this subpart may be collected—

(1) 30 days after a recipient receives notice of a disallowance decision if the recipient fails to file an acceptable application for review under § 81.27; or

(2) On the date of the final decision of the Department under § 81.34 if the recipient obtains review of a disallowance decision.

(c) The Department takes no collection action pending judicial review of a final decision of the Department under section 458 of GEPA.

(d) If a recipient obtains review of a disallowance decision under § 81.28, the Department does not collect interest on the claim for the period between the date of the disallowance decision and the date of the final decision of the Department under § 81.34.

(Authority: 20 U.S.C. 1234(f)(1); 1234a(f)(1) and (2), (i), and (1))

APPENDIX TO PART 81—ILLUSTRATIONS OF PROPORTIONALITY

(1) *Ineligible beneficiaries.* A State uses 15 percent of its grant to meet the special educational needs of children who were migratory, but who have not migrated for more than five years as a Federal program statute requires for eligibility to participate in the program. Result: Recovery of 15 percent of the grant—all program funds spent for the benefit of those children. Although the services were authorized, the children were not eligible to receive them.

(2) *Ineligible beneficiaries.* A Federal program designed to meet the special educational needs of gifted and talented children requires that at least 80 percent of the children served in any project must be identified as gifted or talented. A local educational agency (LEA) conducts a project in which 76 students are identified as gifted or talented and 24 are not. The project was designed and implemented to meet the special educational needs of gifted and talented students. Result: The LEA must return five percent of the project costs. The LEA provided authorized services for a project in which the 76 target students had to constitute at least 80 percent of the total. Thus, the maximum number of non-target students permitted was 19. Project costs relating to the remaining five students must be returned.

(3) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that only 15 percent of the children were identified as gifted or talented. On the basis of the low percentage of these children and other evidence, the authorized Departmental official finds that the project as a whole did not address their special educational needs and was outside the purpose of the statute. Result: The LEA must return its entire award. The difference between the required percentage of gifted and talented children and the percentage actually enrolled is so substantial that, if consistent with other evidence, the official may reasonably conclude the entire grant was misused.

(4) *Ineligible beneficiaries.* Same as the example in paragraph (2), except that 60 percent of the children were identified as gifted or talented, and it is not clear whether the project was designed or implemented to meet the special educational needs of these children. Result: If it is determined that the project was designed and implemented to serve their special educational needs, the LEA must return 25 percent of the project costs. A project that included 60 target children would meet the requirement that 80 percent of the children served be gifted and talented if it included no more than 15 other children. Thus, while the LEA provided authorized services, only 75 percent of the beneficiaries were authorized to participate in the project (60 target children and 15 others). If the authorized Departmental official, after examining all the relevant facts, determines that the project was not designed and implemented to serve the special educational needs of gifted or talented students, the LEA must return its entire award because it did not provide services authorized by the statute.

(5) *Unauthorized activities.* An LEA uses ten percent of its grant under a Federal program that authorizes activities only to meet the special educational needs of educationally deprived children to pay for health services that are available to all children in the LEA. All the children who use the Federally funded health services happen to be educationally deprived, and thus eligible to receive program services. Result: Recovery of ten percent of the grant—all program funds spent for the health services. Although the children were eligible to receive program services, the health services were unrelated to a special educational need and, therefore, not authorized by law.

(6) *Set-aside requirement.* A State uses 22 percent of its grant for one fiscal year under a Federal adult education program to provide programs of equivalency to a certificate of graduation from a secondary school. The adult education program statute restricts

those programs to no more than 20 percent of the State's grant. Result: Two percent of the State's grant must be returned. Although all 22 percent of the funds supported adult education, the State had no authority to spend more than 20 percent on secondary school equivalency programs.

(7) *Set-aside requirement.* A State uses eight percent of its basic State grant under a Federal vocational education program to pay for the excess cost of vocational education services and activities for handicapped individuals. The program statute requires a State to use ten percent of its basic State grant for this purpose. Result: The State must return two percent of its basic State grant, regardless of how it was used. Because the State was required to spend that two percent on services and activities for handicapped individuals and did not do so, it diverted those funds from their intended purposes, and the Federal interest was harmed to that extent.

(8) *Excess cost requirement.* An LEA uses funds reserved for the disadvantaged under a Federal vocational education program to pay for the cost of the same vocational education services it provides to non-disadvantaged individuals. The program statute requires that funds reserved for the disadvantaged must be used to pay only for the supplemental or additional costs of vocational education services that are not provided to other individuals and that are required for disadvantaged individuals to participate in vocational education. Result: All the funds spent on the disadvantaged must be returned. Although the funds were spent to serve the disadvantaged, the funds were available to pay for only the supplemental or additional costs of providing services to the disadvantaged.

(9) *Maintenance-of-effort requirement.* An LEA participates in a Federal program in fiscal year 1988 that requires it to maintain its expenditures from non-Federal sources for program purposes to receive its full allotment. The program statute requires that non-Federal funds expended in the first preceding fiscal year must be at least 90 percent of non-Federal funds expended in the second preceding fiscal year and provides for a reduction in grant amount proportional to the shortfall in expenditures. No waiver of the requirement is authorized. In fiscal year 1986 the LEA spent $100,000 from non-Federal sources for program purposes; in fiscal year 1987, only $87,000. Result: The LEA must return 1/30 of its fiscal year 1988 grant—the amount of its grant that equals the proportion of its shortfall ($3,000) to the required level of expenditures ($90,000). If, instead, the statute made maintenance of expenditures a clear condition of the LEA's eligibility to receive funds and did not provide for a proportional reduction in the grant award, the LEA would be required to return its entire grant.

(10) *Supplanting prohibition.* An LEA uses funds under a Federal drug education program to provide drug abuse prevention counseling to students in the eighth grade. The LEA is required to provide that same counseling under State law. Funds under the Federal program statute are subject to a supplement-not-supplant requirement. Result: All the funds used to provide the required counseling to the eighth-grade students must be returned. The Federal funds did not increase the total amount of spending for program purposes because the counseling would have been provided with non-Federal funds if the Federal funds were not available.

(11) *Matching requirement.* A State receives an allotment of $90,000 for fiscal year 1988 under a Federal adult education program. It expends its full allotment and $8,000 from its own resources for adult education. Under the Federal statute, the Federal share of expenditures for the State's program is 90 percent. Result: The State must return the unmatched Federal funds, or $18,000. Expenditure of a $90,000 Federal allotment required $10,000 in matching State expenditures, $2,000 more than the State's actual expenditures. At a ratio of one State dollar for every nine Federal dollars, $18,000 in Federal funds were unmatched.

(12) *Application requirements.* In order to receive funds under a Federal program that supports a wide range of activities designed to improve the quality of elementary and secondary education, an LEA submits an application to its State educational agency (SEA) for a subgrant to carry out school-level basic skills development programs. The LEA submits its application after conducting an assessment of the needs of its students in consultation with parents, teachers, community leaders, and interested members of the general public. The Federal program statute requires the application and consultation processes. The SEA reviews the LEA's application, determines that the proposed programs are sound and the application is in compliance with Federal law, and approves the application. After the LEA receives the subgrant, it unilaterally decides to use 20 percent of the funds for gifted and talented elementary school students—an authorized activity under the Federal statute. However, the LEA does not consult with interested parties and does not amend its application. Result: 20 percent of the LEA's subgrant must be returned. The LEA had no legal authority to use Federal funds for programs or activities other than those described in its approved application, and its actions with respect to 20 percent of the subgrant not only impaired the integrity of

the application process, but caused significant harm to other Federal interests associated with the program as follows: the required planning process was circumvented because the LEA did not consult with the specified local interests; program accountability was impaired because neither the SEA nor the various local interests that were to be consulted had an opportunity to review and comment on the merits of the gifted and talented program activities, and the LEA never had to justify those activities to them; and fiscal accountability was impaired because the SEA and those various local interests were, in effect, misled by the LEA's unamended application regarding the expenditure of Federal funds.

(13) *Harmless violation.* Under a Federal program, a grantee is required to establish a 15-member advisory council of affected teachers, school administrators, parents, and students to assist in program design, monitoring, and evaluation. Although the law requires at least three student members of the council, a grantee's council contains only two. The project is carried out, and no damage to the project attributable to the lack of a third student member can be identified. Result: No financial recovery is required, although the grantee must take other appropriate steps to come into compliance with the law. The grantee's violation has not measurably harmed a Federal interest associated with the program.

(Authority: 20 U.S.C. 1221e-3(a)(1), 1234(f)(1), 1234b(a), 3474(a))

[54 FR 19512, May 5, 1989; 54 FR 21622, May 19, 1989]

PART 82—NEW RESTRICTIONS ON LOBBYING

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APPENDIX A TO PART 82—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 82—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Pub. L. 101-121 (31 U.S.C. 1352); 20 U.S.C. 3474.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990 (interim) and 55 FR 26200, June 27, 1990 (final), unless otherwise noted.

Subpart A—General

§ 82.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agecment to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 82.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 82.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

Subpart B—Activities by Own Employees

§ 82.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or

adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Pub. L. 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 82.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 82. 210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 82. 300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 82.100(a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 82.110(a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 82.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in

writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 82.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 82.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 82.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 82.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 82.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 82—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United

States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

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APPENDIX B TO PART 82—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB 0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:
☐ a. contract
b. grant
c. cooperative agreement
d. loan
e. loan guarantee
f. loan insurance

2. Status of Federal Action:
☐ a. bid/offer/application
b. initial award
c. post-award

3. Report Type:
☐ a. initial filing
b. material change
For Material Change Only:
year ______ quarter ______
date of last report ______

4. Name and Address of Reporting Entity:
☐ Prime ☐ Subawardee
Tier ____, *if known*
Congressional District, *if known*

5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:
Congressional District, *if known*

6. Federal Department/Agency:

7. Federal Program Name/Description:
CFDA Number, *if applicable* ______

8. Federal Action Number, *if known:*

9. Award Amount, *if known:*
$

10. a. Name and Address of Lobbying Entity
(if individual, last name, first name, MI):

b. Individuals Performing Services *(including address if different from No. 10a)*
(last name, first name, MI):

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. Amount of Payment *(check all that apply):*
$ ______ ☐ actual ☐ planned

12. Form of Payment *(check all that apply):*
☐ a. cash
☐ b. in-kind; specify: nature ______
value ______

13. Type of Payment *(check all that apply):*
☐ a. retainer
☐ b. one-time fee
☐ c. commission
☐ d. contingent fee
☐ e. deferred
☐ f. other; specify: ______

14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Signature: ______
Print Name: ______
Title: ______
Telephone No.: ______ **Date:** ______

Federal Use Only:

Authorized for Local Reproduction
Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

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DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
[illegible]

Reporting Entity: ______________________ Page _____ of _____

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Standard Form [illegible]

PART 85—GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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APPENDIX B TO PART 85—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS
APPENDIX C TO PART 85—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D 41 U.S.C. 701 et seq); 20 U.S.C. 3474, 1221e-3(a)(1).

SOURCE: 53 FR 19191 and 19204, May 26, 1988, unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Subpart A—General

§ 85.100 Purpose.

(a) Executive Order (E.O.) 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Except as provided in § 85.200, Debarment or Suspension, § 85.201, Treatment of Title IV, HEA participation, and § 85.215, Exception provision, debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in § 85.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19191, May 26, 1988]

§ 85.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or,* a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801-12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for exemple, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* complied, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated.

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) *ED.* The U.S. Department of Education.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 85.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 85.110(a). Sections 85.325, "Scope of debarment," and 85.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR Subpart 9.4.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart B—Effect of Action

§ 85.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law and subject to § 85.201, Treatment of Title IV, HEA participation, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, ED shall not enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 85.215.

(b) *Lower tier covered transactions.* Except to the extent prohibited by law and subject to § 85.210, Treatment of Title IV, HEA participation, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transaction (see § 85.110(a)(1)(ii)) for the period of their debarment or suspension. Such persons shall also be excluded from all contracts to provide federally-required audit services regardless of contract amount.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.201 Treatment of Title IV, HEA participation.

(a)(1) The debarment of an educational institution under E.O. 12549 pursuant to procedures that comply with 5 U.S.C. 554-557 (formal adjudication requirements under the Administrative Procedures Act) terminates the institution's eligibility to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended, for the duration of the debarment.

(2)(i) The suspension of an educational institution under E.O. 12549 pursuant to procedures that comply with 5 U.S.C. 554-557 suspends the institution's eligibility to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(ii) The suspension of Title IV eligibility lasts for a period of 60 days, beginning on the date of the suspending official's decision, except that it may last longer if the institution and the Secretary agree to an extension or if the Secretary initiates a limitation or termination proceeding against the institution under 34 CFR Part 668, Subpart G, prior to the 60th day.

(b)(1) Except as provided in paragraph (a) of this section, the debarment, suspension, proposed debarment, or proposed suspension of an educational institution or lender under E.O. 12549 does not affect the eligibility of the institution or lender to participate in any student financial assistance program authorized by Title IV of the Higher Education Act of 1965, as amended.

(2)(i) The Secretary initiates a debarment or suspension proceeding under § 85.316 or § 85.414, respectively, against an educational institution that is suspended or debarred under E.O. 12549 by ED or another Federal agency if the procedures used did not comply with 5 U.S.C. 554.557.

(ii) The Secretary conducts an audit or program review of any lender that is debarred or suspended by ED or another Federal agency, to determine whether grounds exist for the initiation of a fine, limitation, suspension, or termination action against the lender under 34 CFR Part 668, Subpart G.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19192, May 26, 1988]

§ 85.205 Ineligible persons.

Persons who are ineligible, as defined in § 85.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 85.315 are excluded in accordance with the terms of their settlements. ED shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.215 Exception provision.

ED may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 85.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 85.505(a).

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Except as provided in § 85.201, Treatment of Title IV, HEA participation, and § 85.215, Exception provision, the Secretary shall not, and participants shall not, renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible or voluntary excluded.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.225 Failure to adhere to restrictions.

Except as permitted under § 85.215 or § 85.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart C—Debarment

§ 85.300 General.

The debarring official may debar a person for any of the causes in § 85.305, using procedures established in §§ 85.310 through 85.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 85.300 through 85.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in § 85.215 or § 85.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided

that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 85.315 or of any settlement of a debarment or suspension action

(5) Violation of any requirement of Subpart F of this part, relating to providing a drug-free workplace, as set forth in § 85.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4960, Jan. 31, 1989 and 55 FR 21699, May 25, 1990]

§ 85.310 Procedures.

ED shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 85.311 through 85.314.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when appropriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 85.305 for proposing debarment;

(d) Of the provisions of § 85.311 through § 85.314, and any other ED procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 85.215 or the debarment or suspension is against—

(A) An educational institution under procedures that do not meet the requirements of § 85.201(a); or

(B) A lender participating in the Title IV, Part B, HEA program.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 53 FR 19192, May 26, 1988]

§ 85.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, ED may, at any time, settle a debarment or suspension action.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see Subpart E).

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.316 Procedures for Title IV, HEA debarments.

(a)(1) If the Secretary debars an educational institution under E.O. 12549, the Secretary uses the following procedures in connection with the debarment to ensure that the debarment also precludes participation under Title IV of the Higher Education Act of 1965, as amended:

(i) The procedures in § 85.312, Notice of proposed debarment, and § 85.314(d), Notice of debarring official's decision.

(ii) Instead of the procedures in § 85.313 and § 85.314(a)–(c), the procedures in 34 CFR Part 668, Subpart G.

(2) An administrative law judge shall act as the debarring official for proceeding under this section.

(b) On appeal from a decision debarring an educational institution, the Secretary issues a final decision after all parties have filed their written materials with the Secretary.

(c) In such a proceeding, in addition to the findings and conclusions required by 34 CFR Part 668, Subpart G, the debarring official, and, on appeal, the Secretary, determine whether there exist sufficient grounds for debarment as set forth in § 85.305.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19192, May 26, 1988]

§ 85.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of Subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of Subpart F of this part (*see* § 85.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 85.311 through 85.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

(Authority: E.O. 12549; 20 U.S.C. 3474)

[53 FR 19191 and 19204, May 26, 1988, as amended at 54 FR 4950 and 4960, Jan. 31, 1989 and 55 FR 21699, May 25, 1990]

§ 85.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 85.311 through 85.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart D—Suspension

§ 85.400 General.

(a) The suspending official may suspend a person for any of the causes in § 85.405 using procedures established in §§ 85.410 through 85.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 85.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 85.400 through 85.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 85.305(a); or

(2) That a cause for debarment under § 85.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* ED shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in §§ 85.411 through 85.413.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 85.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of §§ 85.411 through 85.413 and any other ED procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 85.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.414 Procedures for Title IV, HEA suspensions under E.O. 12549.

(a) *Title IV E.O. 12549 suspensions.* (1) If the Secretary suspends an educational institution under E.O. 12549, the Secretary uses the following procedures in connection with the suspension to ensure that the suspension also precludes participation under Title IV of the Higher Education Act of 1965, as amended:

(i) The procedures in § 85.411, Notice of suspension.

(ii) Instead of the procedures in §§ 85.412, 85.413, and 85.415, the procedures in 34 CFR Part 668, Subpart G.

(2) An administrative law judge shall act as the suspending official for proceeding under this section.

(3) In such a proceeding, in addition to the findings and conclusions required by 34 CFR Part 668, Subpart G, the suspending official, and, on appeal, the Secretary, determine whether there exist sufficient grounds for suspension under E.O. 12549 as set forth in § 85.405.

(b) *Continued assistance under Title IV, HEA.* The institution may continue its participation in the Title IV programs until the procedures described in paragraph (a) of this section, except for those relating to appeals to the Secretary, have been completed, unless the Secretary takes an emergency action under 34 CFR Part 668, Subpart G.

(Authority: E.O. 12549; 20 U.S.C. 1082(a)(1) and (h)(1), 1094(c)(1)(D), 3474)

[53 FR 19193, May 26, 1988]

§ 85.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 85.325), except that the procedures of §§ 85.410 through 85.413 shall be used in imposing a suspension.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart E—Responsibilities of GSA, ED and Participants

§ 85.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.505 ED responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which ED has granted exceptions under § 85.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 85.500(b) and of the exceptions granted under § 85.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) ED officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) ED officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

(Authority: E.O. 12549; 20 U.S.C. 3474)

§ 85.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this Part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this Part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligiblity of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to ED if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

(Authority: E.O. 12549; 20 U.S.C. 3474)

Subpart F—Drug-Free Workplace Requirements (Grants)

Source: 55 FR 21688, 21699, May 25, 1990, unless otherwise noted.

Effective Date Note: At 55 FR 21688, 21699, May 25, 1990, subpart F to part 85 was revised, effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date. For the convenience of the user, the superseded text follows the new text.

§ 85.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 85.605 Definitions.

(a) Except as amended in this section, the definitions of § 85.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management governmentwide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 85.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 85.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § 85.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 85.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 85.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 85.320(a)(2) of this part).

§ 85.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 85.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until July 31, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(1) If a State elects to make one certification in each Federal fiscal year as specified in paragraph (c) of this section it must forward its certification to: Office of Intergovernmental and Interagency Affairs.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until July 31, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(i) If a State agency elects to make one certification in each Federal fiscal year as specified in paragraph (d) of this section it must forward its certification to: Office of Intergovernmental and Interagency Affairs.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

[55 FR 21688, 21699, May 25, 1990, as amended at 55 FR 21699, May 25, 1990]

§ 85.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(i) A grantee must report convictions as specified in paragraph (a)(1) of this section to the Director, Grants and Contracts Service, Office of Management.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(1) A grantee must report convictions as specified in paragraph (b) of this section to the Director, Grants and Contracts Service, Office of Management.

(Approved by the Office of Management and Budget under control number 0991-0002)

[55 FR 21688, 21699, May 25, 1990, as amended at 55 FR 21699, May 25, 1990]

EFFECTIVE DATE NOTE: At 55 FR 21688, 21699, May 25, 1990, subpart F to part 85 was revised, effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text of subpart F follows.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 54 FR 4950 and 4960, Jan. 31, 1989, unless otherwise noted.

§ 85.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR Subparts 9.4, 23.5, and 52.2.

§ 85.605 Definitions.

(a) Except as amended in this section, the definitions of § 85.105 apply to this subpart.

(b) For purposes of this subpart—

(1) "Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1300.11 through 1300.15.

(2) "Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) "Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use or possession of any controlled substance;

(4) "Drug-free workplace" means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance;

(5) "Employee" means the employee of a grantee directly engaged in the performance of work pursuant to the provisions of the grant;

(6) "Federal agency" or "agency" means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) "Grant" means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide regulation ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"). The term does not include technical assistance which provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) "Grantee" means a person who applies for or receives a grant directly from a Federal agency;

(9) "Individual" means a natural person.

§ 85.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

(c) The provisions of Subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 85.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certificaiton under § 85.630;

(b) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.)(a)-(g) of the certification for grantees other than individuals (Alternate I to Appendix C) or by failing to carry out the requirements of the certification for grantees who are individuals (Alternate II to Appendix C); or

(c) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

§ 85.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 85.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 85.320(a)(2) of this part).

§ 85.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 85.630 Grantees' responsibilities.

(a) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the agency, as provided in Appendix C to this part.

(b) Except as provided in this paragraph, a grantee shall make the required certification for each grant. A grantee that is a State may elect to submit an annual certification to each Federal agency from which it obtains grants in lieu of certifications for each grant during the year covered by the certification.

(c) Grantees are not required to provide a certification in order to continue receiving funds under a grant awarded before the effective date of this subpart or under a no-cost time extension of any grant.

APPENDIX A TO PART 85—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall privide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transac-

tion, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX B TO PART 85—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILTY AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

APPENDIX C TO PART 85—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

____

____

____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21699, May 25, 1990]

Effective Date Note: At 55 FR 21690, 21699, May 25, 1990, Appendix C to part 85 was revised, effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date. For the convenience of the user, the superseded text follows.

Appendix C to Part 85—Certification Regarding Drug-Free Workplace Requirements

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance was placed when the agency determined to award the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

Certification Regarding Drug-Free Workplace Requirements

Alternate I

A. The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee shall insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

____

____

____

Alternate II

The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

[54 FR 4950 and 4960, Jan. 31, 1989]

PART 98—STUDENT RIGHTS IN RESEARCH, EXPERIMENTAL PROGRAMS, AND TESTING

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PART 86—DRUG-FREE SCHOOLS AND CAMPUSES

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Authority: 20 U.S.C. 1145g, 3224a.

Subpart A—General

§ 86.1 What is the purpose of the Drug-Free Schools and Campuses Regulations?

The purpose of the Drug-Free Schools and Campuses Regulations is to implement section 22 of the Drug-Free Schools and Communities Act Amendments of 1989, which adds section 1213 to the Higher Education Act and section 5145 to the Drug-Free Schools and Communities Act. These amendments require that, as a condition of receiving funds or any other form of financial assistance under any Federal program, an institution of higher education (IHE), State educational agency (SEA), or local educational agency (LEA) must certify that it has adopted and implemented a drug prevention program as described in this part.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.2 What Federal programs are covered by this part?

The Federal programs covered by this part include—

(a) All programs administered by the Department of Education under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance; and

(b) All programs administered by any other Federal agency under which an IHE, SEA, or LEA may receive funds or any other form of Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.3 What actions shall an IHE, SEA, or LEA take to comply with the requirements of this part?

(a) An IHE, SEA, or LEA shall adopt and implement a drug prevention program as described in § 86.100 for IHEs, and §§ 86.200 and 86.201 for SEAs and LEAs, to prevent the unlawful possession, use, or distribution of illicit drugs and alcohol by all students and employees on school premises or as part of any of its activities.

(b) An IHE, SEA, or LEA shall provide a written certification that it has adopted and implemented the drug prevention program described in § 86.100 for IHEs, and §§ 86.200 and 86.201 for SEAs and LEAs.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.4 What are the procedures for submitting a drug prevention program certification?

(a) *IHE drug prevention program certification.* An IHE shall submit to the Secretary the drug prevention program certification required by § 86.3(b).

(b) *SEA drug prevention program certification.* An SEA shall submit to the Secretary the drug prevention program certification required by § 86.3(b).

(c) *LEA drug prevention program certification.*

(1) The SEA shall develop a drug prevention program certification form and a schedule for submission of the certification by each LEA within its jurisdiction.

(2) An LEA shall submit to the SEA the drug prevention program certification required by § 86.3(b).

(3)(i) The SEA shall provide to the Secretary a list of LEAs that have not submitted drug prevention program certifications and certify that all other LEAs in the State have submitted drug prevention program certifications to the SEA.

(ii) The SEA shall submit updates to the Secretary so that the list of LEAs described in paragraph (c)(3)(i) of this section is accurate at all times.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.5 What are the consequences if an IHE, SEA, or LEA fails to submit a drug prevention program certification?

(a) An IHE, SEA, or LEA that fails to submit a drug prevention program certification is not eligible to receive funds or any other form of financial assistance under any Federal program.

(b) The effect of loss of eligibility to receive funds or any other form of Federal financial assistance is determined by the statute and regulations governing the Federal programs under which an IHE, SEA, or LEA receives or desires to receive assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.6 When must an IHE, SEA, or LEA submit a drug prevention program certification?

(a) After October 1, 1990, except as provided in paragraph (b) of this section, an IHE, SEA, or LEA is not eligible to receive funds or any other form of financial assistance under any Federal program until the IHE, SEA, or LEA has submitted a drug prevention program certification.

(b)(1) The Secretary may allow an IHE, SEA, or LEA until not later than April 1, 1991, to submit the drug prevention program certification, only if the IHE, SEA, or LEA establishes that it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(2) An IHE, SEA, or LEA that wants to receive an extension of time to submit its drug prevention program certification shall submit a written justification to the Secretary that—

(i) Describes each part of its drug prevention program, whether in effect or planned;

(ii) Provides a schedule to complete and implement its drug prevention program; and

(iii) Explains why it has a need, other than administrative convenience, for more time to adopt and implement its drug prevention program.

(3)(i) An IHE or SEA shall submit a request for an extension to the Secretary.

(ii)(A) An LEA shall submit any request for an extension to the SEA.

(B) The SEA shall transmit any such request for an extension to the Secretary.

(C) The SEA may include with the LEA's request a recommendation as to whether the Secretary should approve it.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.7 What definitions apply to this part?

(a) *Definitions in the Drug-Free Schools and Communities Act.* The following terms used in this part are defined in the Act:

Drug abuse education and prevention
Illicit drug use

(b) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR part 77:

Department
EDGAR
Local educational agency
Secretary
State educational agency.

(c) *Other definitions.* The following terms used in this part are defined as follows:

Compliance agreement means an agreement between the Secretary and an IHE, SEA, or LEA that is not in full compliance with its drug prevention program certification. The agreement specifies the steps the IHE, SEA, or LEA will take to comply fully with its drug prevention program certification, and provides a schedule for the accomplishment of those steps. A compliance agreement does not excuse or remedy past violations of this part.

Institution of higher education means—

(1) An institution of higher education, as defined in 34 CFR 600.4;

(2) A proprietary institution of higher education, as defined in 34 CFR 600.5;

(3) A postsecondary vocational institution, as defined in 34 CFR 600.6; and

(4) A vocational school, as defined in 34 CFR 600.7.

(Authority: 20 U.S.C. 1145g, 3224a)

Subpart B—Institutions of Higher Education

§ 86.100 What must the IHE's drug prevention program include?

The IHE's drug prevention program must, at a minimum, include the following:

(a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of—

(1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;

(2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;

(3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;

(4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and

(5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(b) A biennial review by the IHE of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

§ 86.101 What review of IHE drug prevention programs does the Secretary conduct?

The Secretary annually reviews a representative sample of IHE drug prevention programs.

(Authority: 20 U.S.C. 1145g)

§ 86.102 What is required of an IHE that the Secretary selects for annual review?

If the Secretary selects an IHE for review under § 86.101, the IHE shall provide the Secretary access to personnel, records, documents and any other necessary information requested by the Secretary to review the IHE's adoption and implementation of its drug prevention program.

(Approved by the Office of Management and Budget under control number 1800–0522)

(Authority: 20 U.S.C. 1145g)

§ 86.103 What records and information must an IHE make available to the Secretary and the public concerning its drug prevention program?

(a) Each IHE that provides the drug prevention program certification required by § 86.3(b) shall, upon request, make available to the Secretary and the public a copy of each item required by § 86.100(a) as well as the results of the biennial review required by § 86.100(b).

(b)(1) An IHE shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraph (a) of this section.

(ii) Any other records reasonably related to the IHE's compliance with the drug prevention program certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the IHE shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 1145g)

Subpart C—State and Local Educational Agencies

§ 86.200 What must the SEA's and LEA's drug prevention program for students include?

The SEA's and LEA's program for all students must, at a minimum, include the following:

(a) Age-appropriate, developmentally based drug and alcohol education and prevention programs (which address the legal, social, and health consequences of drug and alcohol use and which provide information about effective techniques for resisting peer pressure to use illicit drugs or alcohol) for all students in all grades of the schools operated or served by the SEA or LEA, from early childhood level through grade 12.

(b) A statement to students that the use of illicit drugs and the unlawful possession and use of alcohol is wrong and harmful.

(c) Standards of conduct that are applicable to students in all the SEA's and LEA's schools and that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students on school premises or as part of any of its activities.

(d) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law), up to and including expulsion and referral for prosecution, will be imposed on students who violate the standards of conduct required by paragraph (c) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(e) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to students.

(f) A requirement that all parents and students be given a copy of the standards of conduct required by paragraph (c) of this section and the statement of disciplinary sanctions described in paragraph (d) of this section.

(g) Notification to parents and students that compliance with the standards of conduct required by paragraph (c) of this section is mandatory.

(h) A biennial review by the SEA or LEA of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (d) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 3224a)

§ 86.201 What must the SEA's and LEA's drug prevention program for employees include?

The SEA's and LEA's program for all employees must, at a minimum, include the following:

(a) Standards of conduct applicable to employees that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol on school premises or as part of any of its activities.

(b) A clear statement that disciplinary sanctions (consistent with local, State, and Federal law) up to and including termination of employment and referral for prosecution, will be imposed on employees who violate the standards of conduct required by paragraph (a) of this section and a description of those sanctions. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

(c) Information about any drug and alcohol counseling and rehabilitation and re-entry programs that are available to employees.

(d) A requirement that employees be given a copy of the standards of conduct required by paragraph (a) of this section and the statement of disciplinary sanctions described in paragraph (b) of this section.

(e) Notification to employees that compliance with the standards of conduct required by paragraph (a) of this section is mandatory.

(f) A biennial review by the SEA and LEA of its program to—

(1) Determine its effectiveness and implement changes to the program if they are needed; and

(2) Ensure that the disciplinary sanctions described in paragraph (b) of this section are consistently enforced.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 3224a)

§ 86.202 What review of SEA and LEA drug prevention programs is required under this subpart?

(a)(1) An SEA shall annually review a representative sample of LEA programs.

(2) If an SEA finds, as a result of its annual review, that an LEA has failed to implement its program or consistently enforce its disciplinary sanctions, the SEA shall submit that information, along with the findings of its review, to the Secretary within thirty (30) days after completion of the review.

(b) The Secretary may annually select a representative sample of SEA programs for review.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 3224a)

§ 86.203 What is required of an SEA or LEA that is selected for review?

(a) If the Secretary selects an SEA for review under § 86.202(b), the SEA shall provide the Secretary access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(b) If the SEA selects an LEA for review under § 86.202(a), the LEA shall provide the SEA access to personnel, records, documents, and any other information necessary to review the adoption and implementation of its drug prevention program.

(Authority: 20 U.S.C. 3224a)

§ 86.204 What records and information must an SEA or LEA make available to the Secretary and the public concerning its drug prevention program?

(a)(1) Each SEA that provides the drug prevention program certification shall, upon request, make available to the Secretary and the public full information about the elements of its drug prevention program, including the results of its biennial review required by §§ 86.200(h) and 86.201(f).

(2) The SEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the SEA's compliance with the certification.

(b)(1) Each LEA that provides the drug prevention program certification shall, upon request, make available to the Secretary, the SEA, and the public full information about the elements of its program, including the results of its biennial review required by §§ 86.200(h) and 86.201(f).

(2) The LEA that provides the drug prevention program certification shall provide the Secretary access to personnel, records, documents, and any other information related to the LEA's compliance with the certification.

(c)(1) Each SEA or LEA shall retain the following records for three years after the fiscal year in which the record was created:

(i) The items described in paragraphs (a) and (b) of this section.

(ii) Any other records related to the SEA's or LEA's compliance with the certification.

(2) If any litigation, claim, negotiation, audit, review, or other action involving the records has been started before expiration of the three-year period, the SEA or LEA shall retain the records until completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

(Approved by the Office of Management and Budget under control number 1880–0522)

(Authority: 20 U.S.C. 3224a)

Subpart D—Responses and Sanctions Issued or Imposed by the Secretary for Violations by an IHE, SEA, or LEA

§ 86.300 What constitutes a violation of this part by an IHE, SEA, or LEA?

An IHE, SEA, or LEA violates this part by—

(a) Receiving any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification in accordance with § 86.3(b); or

(b) Violating its certification. Violation of a certification includes failure of an IHE, SEA, or LEA to—

(1) Adopt or implement its drug prevention program; or

(2) Consistently enforce its disciplinary sanctions for violations by students and employees of the standards of conduct adopted by an IHE under § 86.100(a)(1) or by an SEA or LEA under §§ 86.200(c) and 86.201(a).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.301 What actions may the Secretary take if an IHE, SEA, or LEA violates this part?

(a) If an IHE, SEA, or LEA violates its certification, the Secretary may issue a response to the IHE, SEA, or LEA. A response may include, but is not limited to—

(1) Provision of information and technical assistance; and

(2) Formulation of a compliance agreement designed to bring the IHE, SEA, or LEA into full compliance with this part as soon as feasible.

(b) If an IHE, SEA, or LEA receives any form of Federal financial assistance without having submitted a certification or violates its certification, the Secretary may impose one or more sanctions on the IHE, SEA, or LEA, including—

(1) Repayment of any or all forms of Federal financial assistance received by the IHE, SEA, or LEA when it was in violation of this part; and

(2) The termination of any or all forms of Federal financial assistance that—

(i)(A) Except as specified in paragraph (b)(2)(ii) of this section, ends an IHE's, SEA's, or LEA's eligibility to receive any or all forms of Federal financial assistance. The Secretary specifies which forms of Federal financial assistance would be affected; and

(B) Prohibits an IHE, SEA, or LEA from making any new obligations against Federal funds; and

(ii) For purposes of an IHE's participation in the student financial assistance programs authorized by title IV of the Higher Education Act of 1965 as amended, has the same effect as a termination under 34 CFR 668.94.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.302 What are the procedures used by the Secretary for providing information or technical assistance?

(a) The Secretary provides information or technical assistance to an IHE, SEA, or LEA in writing, through site visits, or by other means.

(b) The IHE, SEA, or LEA shall inform the Secretary of any corrective action it has taken within a period specified by the Secretary.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.303 What are the procedures used by the Secretary for issuing a response other than the formulation of a compliance agreement or the provision of information or technical assistance?

(a) If the Secretary intends to issue a response other than the formulation of a compliance agreement or the provision of information or technical assistance, the Secretary notifies the IHE, SEA, or LEA in writing of—

(1) The Secretary's determination that there are grounds to issue a response other than the formulation of a compliance agreement or providing information or technical assistance; and

(2) The response the Secretary intends to issue.

(b) An IHE, SEA, or LEA may submit written comments to the Secretary on the determination under paragraph (a)(1) of this section and the intended response under paragraph (a)(2) of this section within 30 days after the date the IHE, SEA, or LEA receives the notification of the Secretary's intent to issue a response.

(c) Based on the initial notification and the written comments of the IHE, SEA, or LEA, the Secretary makes a final determination and, if appropriate, issues a final response.

(d) The IHE, SEA, or LEA shall inform the Secretary of the corrective action it has taken in order to comply with the terms of the Secretary's response within a period specified by the Secretary.

(e) If an IHE, SEA, or LEA does not comply with the terms of a response issued by the Secretary, the Secretary may issue an additional response or impose a sanction on the IHE, SEA, or LEA in accordance with the procedures in § 86.304.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.304 What are the procedures used by the Secretary to demand repayment of Federal financial assistance or terminate an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance?

(a) A designated Department official begins a proceeding for repayment of Federal financial assistance or termination, or both, of an IHE's, SEA's, or LEA's eligibility for any or all forms of Federal financial assistance by sending the IHE, SEA, or LEA a notice by certified mail with return receipt requested. This notice—

(1) Informs the IHE, SEA, or LEA of the Secretary's intent to demand repayment of Federal financial assistance or to terminate, describes the consequences of that action, and identifies the alleged violations that constitute the basis for the action;

(2) Specifies, as appropriate—

(i) The amount of Federal financial assistance that must be repaid and the date by which the IHE, SEA, or LEA must repay the funds; and

(ii) The proposed effective date of the termination, which must be at least 30 days after the date of receipt of the notice of intent; and

(3) Informs the IHE, SEA, or LEA that the repayment of Federal financial assistance will not be required or that the termination will not be effective on the date specified in the notice if the designated Department official receives, within a 30-day period beginning on the date the IHE, SEA, or LEA receives the notice of intent described in this paragraph—

(i) Written material indicating why the repayment of Federal financial assistance or termination should not take place; or

(ii) A request for a hearing that contains a concise statement of disputed issues of law and fact, the IHE's, SEA's, or LEA's position with respect to these issues, and, if appropriate, a description of which Federal financial assistance the IHE, SEA, or LEA contends need not be repaid.

(b) If the IHE, SEA, or LEA does not request a hearing but submits written material—

(1) The IHE, SEA, or LEA receives no additional opportunity to request or receive a hearing; and

(2) The designated Department official, after considering the written material, notifies the IHE, SEA, or LEA in writing whether—

(i) Any or all of the Federal financial assistance must be repaid; or

(ii) The proposed termination is dismissed or imposed as of a specified date.

(Authority: 20 U.S.C. 1145g, 3224a)

Subpart E—Appeal Procedures

§ 86.400 What is the scope of this subpart?

(a) The procedures in this subpart are the exclusive procedures governing appeals of decisions by a designated Department official to demand the repayment of Federal financial assistance or terminate the eligibility of an IHE, SEA, or LEA to receive some or all forms of Federal financial assistance for violations of this part.

(b) An Administrative Law Judge (ALJ)) hears appeals under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.401 What are the authority and responsibility of the ALJ?

(a) The ALJ regulates the course of the proceeding and conduct of the parties during the hearing and takes all steps necessary to conduct a fair and impartial proceeding.

(b) The ALJ is not authorized to issue subpoenas.

(c) The ALJ takes whatever measures are appropriate to expedite the proceeding. These measures may include, but are not limited to—

(1) Scheduling of conferences;

(2) Setting time limits for hearings and submission of written documents; and

(3) Terminating the hearing and issuing a decision against a party if that party does not meet those time limits.

(d) The scope of the ALJ's review is limited to determining whether—

(1) The IHE, SEA, or LEA received any form of Federal financial assistance after becoming ineligible to receive that assistance because of failure to submit a certification; or

(2) The IHE, SEA, or LEA violated its certification.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.402 Who may be a party in a hearing under this subpart?

(a) Only the designated Department official and the IHE, SEA, or LEA that is the subject of the proposed termination or recovery of Federal financial assistance may be parties in a hearing under this subpart.

(b) Except as provided in this subpart, no person or organization other than a party may participate in a hearing under this subpart.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.403 May a party be represented by counsel?

A party may be represented by counsel.

(Authority: 20 U.S.C. 1145g, 3224a)

86.404 How may a party communicate ith an ALJ?

(a) A party may not communicate ith an ALJ on any fact at issue in the ase or on any matter relevant to the erits of the case unless the other party given notice and an opportunity to articipate.

(b)(1) To obtain an order or ruling rom an ALJ, a party shall make a notion to the ALJ.

(2) Except for a request for an xtension of time, a motion must be nade in writing unless the parties ppear in person or participate in a onference telephone call. The ALJ may equire a party to reduce an oral motion to writing.

(3) If a party files a written motion, the party shall do so in accordance with § 86.405.

(4) Except for a request for an extension of time, the ALJ may not grant a party's written motion without the consent of the other party unless the other party has had at least 21 days from the date of service of the motion to respond. However, the ALJ may deny a motion without awaiting a response.

(5) The date of service of a motion is determined by the standards for determining a filing date in § 86.405(d).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.405 What are the requirements for filing written submissions?

(a) Any written submission under this subpart must be filed by hand-delivery or by mail through the U.S. Postal Service.

(b) If a party files a brief or other document, the party shall serve a copy of the filed material on the other party on the filing date by hand-delivery or by mail.

(c) Any written submission must be accompanied by a statement certifying the date that the filed material was filed and served on the other party.

(d)(1) The filing date for a written submission is either—

(i) The date of hand-delivery; or

(ii) The date of mailing.

(2) If a scheduled filing date falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next Federal business day.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.406 What must the ALJ do if the parties enter settlement negotiations?

(a) If the parties to a case file a joint motion requesting a stay of the proceedings for settlement negotiations or for the parties to obtain approval of a settlement agreement, the ALJ grants the stay.

(b) The following are not admissible in any proceeding under this part:

(1) Evidence of conduct during settlement negotiations.

(2) Statements made during settlement negotiations.

(3) Terms of settlement offers.

(c) The parties may not disclose the contents of settlement negotiations to the ALJ. If the parties enter into a settlement agreement and file a joint motion to dismiss the case, the ALJ grants the motion.

(Authority: 20 U.S.C. 1145g, 3224a,

§ 86.407 What are the procedures for scheduling a hearing?

(a) If the IHE, SEA, or LEA requests a hearing by the time specified in § 86.304(a)(3), the designated Department official sets the date and the place.

(b)(1) The date is at least 15 days after the designated Department official receives the request and no later than 45 days after the request for hearing is received by the Department.

(2) On the motion of either or both parties, the ALJ may extend the period before the hearing is scheduled beyond the 45 days specified in paragraph (b)(1) of this section.

(c) No termination takes effect until after a hearing is held and a decision is issued by the Department.

(d) With the approval of the ALJ and the consent of the designated Department official and the IHE, SEA, or LEA, any time schedule specified in this section may be shortened.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.408 What are the procedures for conducting a pre-hearing conference?

(a)(1) A pre-hearing conference may be convened by the ALJ if the ALJ thinks that such a conference would be useful, or if requested by—

(i) The designated Department official; or

(ii) The IHE, SEA, or LEA.

(2) The purpose of a pre-hearing conference is to allow the parties to settle, narrow, or clarify the dispute.

(b) A pre-hearing conference may consist of—

(1) A conference telephone call;

(2) An informal meeting; or

(3) The submission and exchange of written material.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.409 What are the procedures for conducting a hearing on the record?

(a) A hearing on the record is an orderly presentation of arguments and evidence conducted by an ALJ.

(b) An ALJ conducts the hearing entirely on the basis of briefs and other written submissions unless—

(1) The ALJ determines, after reviewing all appropriate submissions, that an evidentiary hearing is needed to resolve a material factual issue in dispute; or

(2) The ALJ determines, after reviewing all appropriate submissions, that oral argument is needed to clarify the issues in the case.

(c) The hearing process may be expedited as agreed by the ALJ, the designated Department official, and the IHE, SEA, or LEA. Procedures to expedite may include, but are not limited to, the following:

(1) A restriction on the number or length of submissions.

(2) The conduct of the hearing by telephone conference call.

(3) A review limited to the written record.

(4) A certification by the parties to facts and legal authorities not in dispute.

(d)(1) The formal rules of evidence and procedures applicable to proceedings in a court of law are not applicable.

(2) The designated Department official has the burden of persuasion in any proceeding under this subpart.

(3)(i) The parties may agree to exchange relevant documents and information.

(ii) The ALJ may not order discovery, as provided for under the Federal Rules of Civil Procedure, or any other exchange between the parties of documents or information.

(4) The ALJ accepts only evidence that is relevant and material to the proceeding and is not unduly repetitious.

(e) The ALJ makes a transcribed record of any evidentiary hearing or oral argument that is held, and makes the record available to—

(1) The designated Department official; and

(2) The IHE, SEA, or LEA on its request and upon payment of a fee comparable to that prescribed under the Department of Education Freedom of Information Act regulations (34 CFR part 5).

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.410 What are the procedures for issuance of a decision?

(a)(1) The ALJ issues a written decision to the IHE, SEA, or LEA, the designated Department official, and the Secretary by certified mail, return receipt requested, within 30 days after—

(i) The last brief is filed;

(ii) The last day of the hearing if one is held; or

(iii) The date on which the ALJ terminates the hearing in accordance with § 86.401(c)(3).

(2) The ALJ's decision states whether the violation or violations contained in the Secretary's notification occurred, and articulates the reasons for the ALJ's finding.

(3) The ALJ bases findings of fact only on evidence in the hearing record and on matters given judicial notice.

(b)(1) The ALJ's decision is the final decision of the agency. However, the Secretary reviews the decision on request of either party, and may review the decision on his or her own initiative.

(2) If the Secretary decides to review the decision on his or her own initiative, the Secretary informs the parties of his or her intention to review by written notice sent within 15 days of the Secretary's receipt of the ALJ's decision.

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(c)(1) Either party may request review by the Secretary by submitting a brief or written materials to the Secretary within 20 days of the party's receipt of the ALJ's decision. The submission must explain why the decision of the ALJ should be modified, reversed, or remanded. The other party shall respond within 20 days of receipt of the brief or written materials filed by the opposing party.

(2) Neither party may introduce new evidence on review.

(d) The decision of the ALJ ordering the repayment of Federal financial assistance or terminating the eligibility of an IHE, SEA, or LEA does not take effect pending the Secretary's review.

(e)(1) The Secretary reviews the ALJ's decision considering only evidence introduced into the record.

(2) The Secretary's decision may affirm, modify, reverse or remand the ALJ's decision and includes a statement of reasons for the decision.

(Authority: 20 U.S.C. 1145g, 3224a)

§ 86.411 What are the procedures for requesting reinstatement of eligibility?

(a)(1) An IHE, SEA, or LEA whose eligibility to receive any or all forms of Federal financial assistance has been terminated may file with the Department a request for reinstatement as an eligible entity no earlier than 18 months after the effective date of the termination.

(2) In order to be reinstated, the IHE, SEA, or LEA must demonstrate that it has corrected the violation or violations on which the termination was based, and that it has met any repayment obligation imposed upon it under § 86.301(b)(1) of this part.

(b) In addition to the requirements of paragraph (a) of this section, the IHE, SEA, or LEA shall comply with the requirements and procedures for reinstatement of eligibility applicable to any Federal program under which it desires to receive Federal financial assistance.

(Authority: 20 U.S.C. 1145g, 3224a)

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 15, 1981

CIRCULAR NO. A-87
Revised

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Cost principles for State and local governments

1. Purpose. This Circular establishes principles and standards for determining costs applicable to grants, contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments.

2. Supersession. This Circular supersedes Federal Management Circular 74-4 as revised. The Circular is reissued under its original designation of OMB Circular A-87.

3. Summary of changes. No substantive changes are made in the Circular.

4. Policy intent. This Circular provides principles for determining the allowable costs of programs administered by State, local, and federally-recognized Indian tribal governments under grants from and contracts with the Federal Government. They are designed to provide the basis for a uniform approach to the problem of determining costs and to promote efficiency and better relationships between grantees and the Federal Government. The principles are for determining costs only and are not intended to identify the circumstances nor to dictate the extent of Federal and State or local participation in the financing of a particular project. They are designed to provide that federally-assisted programs bear their fair share of costs recognized under these principles except where restricted or prohibited by law. No provision for profit or other increment above cost is intended.

5. Applicability and scope.

a. The provisions of this Circular apply to all Federal agencies responsible for administering programs that involve grants and contracts with State, local, and federally-recognized Indian tribal governments.

b. Its provisions do not apply to grants and contracts with:

(1) Publicly-financed educational institutions subject to Office of Management and Budget Circular A-21, and

(2) Publicly owned hospitals and other providers of medical care subject to requirements promulgated by the sponsoring Federal agencies.

Any other exceptions will be approved by the Office of Management and Budget in particular cases where adequate justification is presented.

6. Attachments. The principles and related policy guides are set forth in the attachments, which are:

Attachment A - Principles for determining costs applicable to grants and contracts with State, local, and federally-recognized Indian tribal governments.

Attachment B - Standards for selected items of cost.

7. Inquiries. Further information concerning this Circular may be obtained by contacting the Financial Management Branch, Budget Review Division, Office of Management and Budget, Washington, D.C. 20503, telephone 202-395-4773.

James T. McIntyre, Jr.

James T. McIntyre, Jr.
Director

Attachments

PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO GRANTS AND CONTRACTS WITH STATE, LOCAL, AND FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS

(No. A-87)

PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO GRANTS AND CONTRACTS WITH STATE, LOCAL, AND FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS

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PRINCIPLES FOR DETERMINING COSTS APPLICABLE TO GRANTS AND CONTRACTS WITH STATE, LOCAL, AND FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS

A. Purpose and scope.

1. Objectives. This Attachment sets forth principles for determining the allowable costs of programs administered by State, local, and federally-recognized Indian tribal governments under grants from and contracts with the Federal Government. The principles are for the purpose of cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in the financing of a particular grant. They are designed to provide that federally-assisted programs bear their fair share of costs recognized under these principles, except where restricted or prohibited by law. No provision for profit or other increment above cost is intended.

2. Policy guides. The application of these principles is based on the fundamental premises that:

a. State, local, and federally-recognized Indian tribal governments are responsible for the efficient and effective administration of grant and contract programs through the application of sound management practices.

b. The grantee or contractor assumes the responsibility for seeing that federally-assisted program funds have been expended and accounted for consistent with underlying agreements and program objectives.

c. Each grantee or contractor organization, in recognition of its own unique combination of staff facilities and experience, will have the primary responsibility for employing whatever form of organization and management techniques may be necessary to assure proper and efficient administration.

3. Application. These principles will be applied by all Federal agencies in determining costs incurred by State, local, and federally recognized Indian tribal governments under Federal grants and cost reimbursement type contracts (including subgrants and subcontracts) except those with (a) publicly-financed educational institutions subject to Office of Management and Budget Circular A-21, and (b) publicly-owned hospitals and other

providers of medical care subject to requirements promulgated by the sponsoring Federal agencies.

B. Definitions.

1. Approval or authorization of the grantor Federal agency means documentation evidencing consent prior to incurring specific cost.

2. Cost allocation plan means the documentation identifying, accumulating, and distributing allowable costs under grants and contracts together with the allocation methods used.

3. Cost, as used herein, means cost as determined on a cash, accrual, or other basis acceptable to the Federal grantor agency as a discharge of the grantee's accountability for Federal funds.

4. Cost objective means a pool, center, or area established for the accumulation of cost. Such areas include organizational units, functions, objects or items of expense, as well as ultimate cost objectives including specific grants, projects, contracts, and other activities.

5. Federal agency means any department, agency, commission, or instrumentality in the executive branch of the Federal Government which makes grants to or contracts with State, local, or federally-recognized Indian tribal governments.

6. Federally-recognized Indian tribal governments means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

7. Grant means an agreement between the Federal Government and a State, local, or federally-recognized Indian tribal government whereby the Federal Government provides funds or aid in kind to carry out specified programs, services, or activities. The principles and policies stated in this Circular as applicable to grants in general also apply to any federally-sponsored cost reimbursement-type of agreement performed by a State, local, or federally-recognized Indian tribal government.

8. Grant program means those activities and operations of the grantee which are necessary to carry out the purposes of the

grant, including any portion of the program financed by the grantee.

9. Grantee means the department or agency of State, local, or federally recognized Indian tribal government which is responsible for administration of the grant.

10. Local unit means any political subdivision of government below the State level.

11. Other State or local agencies means departments or agencies of the State or local unit which provide goods, facilities, and services to a grantee.

12. Services, as used herein, means goods and facilities, as well as services.

13. Supporting services means auxiliary functions necessary to sustain the direct effort involved in administering a grant program or an activity providing service to the grant program. These services may be centralized in the grantee department or in some other agency, and include procurement, payroll, personnel functions, maintenance and operation of space, data processing, accounting, budgeting, auditing, mail and messenger service, and the like.

C. Basic guidelines.

1. Factors affecting allowability of costs. To be allowable under a grant program, costs must meet the following general criteria:

a. Be necessary and reasonable for proper and efficient administration of the grant programs, be allocable thereto under these principles, and, except as specifically provided herein, not be a general expense required to carry out the overall responsibilities of State, local, or federally-recognized Indian tribal governments.

b. Be authorized or not prohibited under State or local laws or regulations.

c. Conform to any limitations or exclusions set forth in these principles, Federal laws, or other governing limitations as to types or amounts of cost items.

d. Be consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which the grantee is a part.

e. Be accorded consistent treatment through application of generally accepted accounting principles appropriate to the circumstances.

f. Not be allocable to or included as a cost of any other federally financed program in either the current or a prior period.

g. Be net of all applicable credits.

2. Allocable costs.

a. A cost is allocable to a particular cost objective to the extent of benefits received by such objective.

b. Any cost allocable to a particular grant or cost objective under the principles provided for in this Circular may not be shifted to other Federal grant programs to overcome fund deficiencies, avoid restrictions imposed by law or grant agreements, or for other reasons.

c. Where an allocation of joint cost will ultimately result in charges to a grant program, an allocation plan will be required as prescribed in Section J.

3. Applicable credits.

a. Applicable credits refer to those receipts or reduction of expenditure-type transactions which offset or reduce expense items allocable to grants as direct or indirect costs. Examples of such transactions are: purchase discounts; rebates or allowances, recoveries or indemnities on losses; sale of publications, equipment, and scrap; income from personal or incidental services; and adjustments of overpayments or erroneous charges.

b. Applicable credits may also arise when Federal funds are received or are available from sources other than the grant program involved to finance operations or capital items of the grantee. This includes costs arising from the use or depreciation of items donated or financed by the Federal Government to fulfill matching requirements under another grant program. These types of credits should likewise be used to reduce related expenditures in determining the rates or amounts applicable to a given grant.

D. Composition of cost.

1. Total cost. The total cost of a grant program is comprised of the allowable direct cost incident to its performance, plus its allocable portion of allowable indirect costs, less applicable credits.

2. Classification of costs. There is no universal rule for classifying certain costs as either direct or indirect under every accounting system. A cost may be direct with respect to some specific service or function, but indirect with respect to the grant or other ultimate cost objective. It is essential, therefore, that each item of cost be treated consistently either as a direct or an indirect cost. Specific guides for determining direct and indirect costs allocable under grant programs are provided in the sections which follow.

E. Direct costs.

1. General. Direct costs are those that can be identified specifically with a particular cost objective. These costs may be charged directly to grants, contracts, or to other programs against which costs are finally lodged. Direct costs may also be charged to cost objectives used for the accumulation of costs pending distribution in due course to grants and other ultimate cost objectives.

2. Application. Typical direct costs chargeable to grant programs are:

a. Compensation of employees for the time and effort devoted specifically to the execution of grant programs.

b. Cost of materials acquired, consumed, or expended specifically for the purpose of the grant.

c. Equipment and other approved capital expenditures.

d. Other items of expense incurred specifically to carry out the grant agreement.

e. Services furnished specifically for the grant program by other agencies, provided such charges are consistent with criteria outlined in Section G of these principles.

F. Indirect costs.

1. General. Indirect costs are those (a) incurred for a common or joint purpose benefiting more than one cost objective, and (b) not readily assignable to the cost objectives specifically benefited, without effort disproportionate to the results achieved. The term "indirect costs," as used herein, applies to costs of this type originating in the grantee department, as well as those incurred by other departments in supplying goods, services, and facilities, to the grantee department. To facilitate equitable distribution of indirect expenses to the cost objectives served, it may be necessary to establish a number of pools of indirect cost within a grantee department or in other agencies providing services to a grantee department. Indirect cost pools should be distributed to benefiting cost objectives on bases which will produce an equitable result in consideration of relative benefits derived.

2. Grantee departmental indirect costs. All grantee departmental indirect costs, including the various levels of supervision, are eligible for allocation to grant programs provided they meet the conditions set forth in this Circular. In lieu of determining the actual amount of grantee departmental indirect cost allocable to a grant program, the following methods may be used:

a. Predetermined fixed rates for indirect costs. A predetermined fixed rate for computing indirect costs applicable to a grant may be negotiated annually in situations where the cost experience and other pertinent facts available are deemed sufficient to enable the contracting parties to reach an informed judgment (1) as to the probable level of indirect costs in the grantee department during the period to be covered by the negotiated rate, and (2) that the amount allowable under the predetermined rate would not exceed actual indirect cost.

b. Negotiated lump sum for overhead. A negotiated fixed amount in lieu of indirect costs may be appropriate under circumstances where the benefits derived from a grantee department's indirect services cannot be readily determined as in the case of small, self-contained or isolated activity. When this method is used, a determination should be made that the amount negotiated will be approximately the same as the actual indirect cost that may be incurred. Such amounts negotiated in lieu of indirect costs will be treated as an offset to total indirect expenses of the grantee department before allocation to remaining activities. The base on which such remaining expenses are allocated should be appropriately adjusted.

3. Limitation on indirect costs.

a. Federal grants may be subject to laws that limit the amount of indirect costs that may be allowed. Agencies that sponsor grants of this type will establish procedures which will assure that the amount actually allowed for indirect costs under each such grant does not exceed the maximum allowable under the statutory limitation or the amount otherwise allowable under this Circular, whichever is the smaller.

b. When the amount allowable under a statutory limitation is less than the amount otherwise allocable as indirect costs under this Circular, the amount not recoverable as indirect costs under a grant may not be shifted to another federally-sponsored grant program or contract.

G. Cost incurred by agencies other than the grantee.

1. General. The cost of service provided by other agencies may only include allowable direct costs of the service plus a pro rata share of allowable supporting costs (Section B.12.) and supervision directly required in performing the service, but not supervision of a general nature such as that provided by the head of a department and his staff assistants not directly involved in operations. However, supervision by the head of a department or agency whose sole function is providing the service furnished would be an eligible cost. Supporting costs include those furnished by other units of the supplying department or by other agencies.

2. Alternative methods of determining indirect cost. In lieu of determining actual indirect cost related to a particular service furnished by another agency, either of the following alternative methods may be used provided only one method is used for a specific service during the fiscal year involved.

a. Standard indirect rate. An amount equal to ten percent of direct labor cost in providing the service performed by another State agency (excluding overtime, shift, or holiday premiums and fringe benefits) may be allowed in lieu of actual allowable indirect cost for that service.

b. Predetermined fixed rate. A predetermined fixed rate for indirect cost of the unit or activity providing service may be negotiated as set forth in Section F.2.a.

H Cost incurred by grantee department for others.

1. General. The principles provided in Section G will also be used in determining the cost of services provided by the grantee department to another agency.

J. Cost allocation plan.

1. General. A plan for allocation of costs will be required to support the distribution of any joint costs related to the grant program. All costs included in the plan will be supported by formal accounting records which will substantiate the propriety of eventual charges.

2. Requirements. The allocation plan of the grantee department should cover all joint costs of the department as well as costs to be allocated under plans of other agencies or organizational units which are to be included in the costs of federally-sponsored programs. The cost allocation plans of all the agencies rendering services to the grantee department, to the extent feasible, should be presented in a single document. The allocation plan should contain, but not necessarily be limited to, the following:

a. The nature and extent of services provided and their relevance to the federally-sponsored programs.

b. The items of expense to be included.

c. The methods to be used in distributing cost.

3. Instructions for preparation of cost allocation plans. The Department of Health and Human Services in consultation with the other Federal agencies concerned, will be responsible for developing and issuing the instructions for use by grantees in preparation of cost allocation plans. This responsibility applies to both central support services at the State, local, and Indian tribal level and indirect cost proposals of individual grantee departments.

4. Negotiation and approval of indirect cost proposals for States.

a. The Department of Health and Human Services, in collaboration with the other Federal agencies concerned, will be responsible for negotiation, approval, and audit of cost allocation plans, which will be submitted to it by the States. These plans will cover central support service costs of the State.

b. At the grantee department level in a State, a single cognizant Federal agency will have responsibility similar to that set forth in a, above, for the negotiation, approval, and audit of the indirect cost proposal. A current list of agency assignments is maintained by the Office of Management and Budget.

c. Questions concerning the cost allocation plans approved under a. and b. above, should be directed to the agency responsible for such approvals.

5. Negotiation and approval of indirect cost proposals for local governments.

a. Cost allocation plans will be retained at the local government level for audit by a designated Federal agency except in those cases where that agency requests that cost allocation plans be submitted to it for negotiation and approval.

b. A list of cognizant Federal agencies assigned responsibility for negotiation, approval and audit of central support service cost allocation plans at the local government level is maintained by the Office of Management and Budget.

c. At the grantee department level of local governments, the Federal agency with the predominant interest in the work of the grantee department will be responsible for necessary negotiation, approval and audit of the indirect cost proposal.

6. Negotiation and approval of indirect cost proposals for federally recognized Indian tribal governments. The Federal agency with the predominant interest in the work of the grantee department will be responsible for necessary negotiation, approval and audit of the indirect cost proposal.

7. Resolution of problems. To the extent that problems are encountered among the Federal agencies in connection with 4 and 5

above, the Office of Management and Budget will lend assistance as required.

STANDARDS FOR SELECTED ITEMS OF COSTS

(No. A-87)

STANDARDS FOR SELECTED ITEMS OF COSTS

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STANDARDS FOR SELECTED ITEMS OF COST

A. Purpose and applicability.

1. Objective. This Attachment provides standards for determining the allowability of selected items of cost.

2. Application. These standards will apply irrespective of whether a particular item of cost is treated as direct or indirect cost. Failure to mention a particular item of cost in the standards is not intended to imply that it is either allowable or unallowable, rather determination of allowability in each case should be based on the treatment of standards provided for similar or related items of cost. The allowability of the selected items of cost is subject to the general policies and principles stated in Attachment A of this Circular.

B. Allowable costs.

1. Accounting. The cost of establishing and maintaining accounting and other information systems required for the management of grant programs is allowable. This includes costs incurred by central service agencies for these purposes. The cost of maintaining central accounting records required for overall State or Indian tribal government purposes, such as appropriation and fund accounts by the Treasurer, Comptroller, or similar officials, is considered to be a general expense of government and is not allowable.

2. Advertising. Advertising media includes newspapers, magazines, radio and television programs, direct mail, trade papers, and the like. The advertising costs allowable are those which are solely for:

a. Recruitment of personnel required for the grant program.

b. Solicitation of bids for the procurement of goods and services required.

c. Disposal of scrap or surplus materials acquired in the performance of the grant agreement.

d. Other purposes specifically provided for in the grant agreement.

3. Advisory councils. Costs incurred by State advisory councils or committees established pursuant to Federal requirements to carry out grant programs are allowable. The cost of like organizations is allowable when provided for in the grant agreement.

4. Audit service. The cost of audits necessary for the administration and management of functions related to grant programs is allowable.

5. Bonding. Costs of premiums on bonds covering employees who handle grantee agency funds are allowable.

6. Budgeting. Costs incurred for the development, preparation, presentation, and execution of budgets are allowable. Costs for services of a central budget office are generally not allowable since these are costs of general government. However, where employees of the central budget office actively participate in the grantee agency's budget process, the cost of identifiable services is allowable.

7. Building lease management. The administrative cost for lease management which includes review of lease proposals, maintenance of a list of available property for lease, and related activities is allowable.

8. Central stores. The cost of maintaining and operating a central stores organization for supplies, equipment, and materials used either directly or indirectly for grant programs is allowable.

9. Communications. Communication costs incurred for telephone calls or service, teletype service, wide area telephone service (WATS), centrex, telpak (tie lines), postage, messenger service and similar expenses are allowable.

10. Compensation for personal services.

a. General. Compensation for personal services includes all remuneration, paid currently or accrued, for services rendered during the period of performance under the grant agreement, including but not necessarily limited to wages, salaries, and supplementary compensation and benefits (Section B.13.). The costs of such compensation are allowable to the extent that total compensation for individual employees: (1) is reasonable for the services rendered; (2) follows an appointment made in accordance with State, local, or Indian tribal government laws and rules and which meets Federal merit system or other requirements, where applicable; and (3) is determined and supported as provided in b. below. Compensation for employees engaged in federally-assisted activities will be considered reasonable to the extent that it is consistent with that paid for similar work in other activities of the State, local, or Indian tribal government. In cases where the kinds of employees required for the federally-assisted activities are not found in the other activities of the State, local, or Indian tribal government, compensation will be considered reasonable to the extent that it is comparable to that paid for similar work in the labor market in which the employing government competes for the kind of employees involved. Compensation surveys providing data representative of the labor market involved will be an acceptable basis for evaluating reasonableness.

b. Payroll and distribution of time. Amounts charged to grant programs for personal services, regardless of whether treated as direct or indirect costs, will be based on payrolls documented and provided in accordance with generally accepted practice of the State, local, or Indian tribal government. Payrolls must be supported by time and attendance or equivalent records for individual employees. Salaries and wages of employees chargeable to more than one grant program or other cost objective will be supported by appropriate time distribution records. The method used should produce an equitable distribution of time and effort.

11. Depreciation and use allowances.

a. Grantees may be compensated for the use of buildings, capital improvements, and equipment through use allowances or depreciation. Use allowances are the means of providing compensation in lieu of depreciation or other equivalent costs. However, a combination of the two methods may not be used in connection with a single class of fixed assets.

b. The computation of depreciation or use allowance will be based on acquisition cost. Where actual cost records have not been maintained, a reasonable estimate of the original acquisition cost may be used in the computation. The computation will exclude the cost or any portion of the cost of buildings and equipment donated or borne directly or indirectly by the Federal Government through charges to Federal grant programs or otherwise, irrespective of where title was originally vested or where it presently resides. In addition, the computation will also exclude the cost of land. Depreciation or a use allowance on idle or excess facilities is not allowable, except when specifically authorized by the grantor Federal agency.

c. Where the depreciation method is followed, adequate property records must be maintained, and any generally-accepted method of computing depreciation may be used. However, the method of computing depreciation must be consistently applied for any specific asset or class of assets for all affected federally-sponsored programs and must result in equitable charges considering the extent of the use of the assets for the benefit of such programs.

d. In lieu of depreciation, a use allowance for buildings and improvements may be computed at an annual rate not exceeding two percent of acquisition cost. The use allowance for equipment (excluding items properly capitalized as building cost) will be computed at an annual rate not exceeding six and two-thirds percent of acquisition cost of usable equipment.

e. No depreciation or use charge may be allowed on any assets that would be considered as fully depreciated, provided, however, that reasonable use charges may be negotiated for any such assets if warranted after taking into consideration the cost of the facility or item involved, the estimated useful life remaining at time of negotiation, the effect of any increased maintenance charges or decreased efficiency due to age, and any other factors pertinent to the utilization of the facility or item for the purpose contemplated.

12. Disbursing service. The cost of disbursing grant program funds by the Treasurer or other designated officer is allowable. Disbursing services cover the processing of checks or warrants, from preparation to redemption, including the necessary records of accountability and reconciliation of such records with related cash accounts.

13. Employee fringe benefits. Costs identified under a. and b. below are allowable to the extent that total compensation for employees is reasonable as defined in Section B.10.

a. Employee benefits in the form of regular compensation paid to employees during periods of authorized absences from the job, such as for annual leave, sick leave, court leave, military leave, and the like, if they are: (1) provided pursuant to an approved leave system; and (2) the cost thereof is equitably allocated to all related activities, including grant programs.

b. Employee benefits in the form of employers' contribution or expenses for social security, employees' life and health insurance plans, unemployment insurance coverage, workmen's compensation insurance, pension plans, severance pay, and the like, provided such benefits are granted under approved plans and are distributed equitably to grant programs and to other activities.

14. Employee morale, health and welfare costs. The costs of health or first-aid clinics and/or infirmaries, recreational facilities, employees' counseling services, employee information publications, and any related expenses incurred in accordance with general State, local or Indian tribal policy, are allowable. Income generated from any of these activities will be offset against expenses.

15. Exhibits. Costs of exhibits relating specifically to the grant programs are allowable.

16. Legal expenses. The cost of legal expenses required in the administration of grant programs is allowable. Legal services furnished by the chief legal officer of a State, local or Indian tribal government or his staff solely for the purpose of discharging his general responsibilities as legal officer are unallowable. Legal expenses for the prosecution of claims against the Federal Government are unallowable.

17. Maintenance and repair. Costs incurred for necessary maintenance, repair, or upkeep of property which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are allowable.

18. Materials and supplies. The cost of materials and supplies necessary to carry out the grant programs is allowable. Purchases made specifically for the grant program should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the grantee. Withdrawals from general stores or stockrooms should be charged at cost under any recognized method of pricing consistently applied. Incoming transportation charges are a proper part of material cost.

19. Memberships, subscriptions and professional activities.

a. Memberships. The cost of membership in civic, business, technical and professional organizations is allowable provided: (1) the benefit from the membership is related to the grant program; (2) the expenditure is for agency membership; (3) the cost of the membership is reasonably related to the value of the services or benefits received; and (4) the expenditure is not for membership in an organization which devotes a substantial part of its activities to influencing legislation.

b. Reference material. The cost of books, and subscriptions to civic, business, professional, and technical periodicals is allowable when related to the grant program.

c. Meetings and conferences. Costs are allowable when the primary purpose of the meeting is the dissemination of technical information relating to the grant program and they are consistent with regular practices followed for other activities of the grantee.

20. Motor pools. The costs of a service organization which provides automobiles to user grantee agencies at a mileage or fixed rate and/or provides vehicle maintenance, inspection and repair services are allowable.

21. Payroll preparation. The cost of preparing payrolls and maintaining necessary related wage records is allowable.

22. Personnel administration. Costs for the recruitment, examination, certification, classification, training, establishment of pay standards, and related activities for grant programs, are allowable.

23. Printing and reproduction. Costs for printing and reproduction services necessary for grant administration, including but not limited to forms, reports, manuals, and informational literature, are allowable. Publication costs of reports or other media relating to grant program accomplishments or results are allowable when provided for in the grant agreement.

24. Procurement service. The cost of procurement service, including solicitation of bids, preparation and award of contracts, and all phases of contract administration in providing goods, facilities and services for grant programs, is allowable.

25. Taxes. In general, taxes or payments in lieu of taxes which the grantee agency is legally required to pay are allowable.

26. Training and education. The cost of in-service training, customarily provided for employee development, which directly or indirectly benefits grant programs is allowable. Out-of-service training involving extended periods of time is allowable only when specifically authorized by the grantor agency.

27. Transportation. Costs incurred for freight, cartage, express, postage and other transportation costs relating either to goods purchased, delivered, or moved from one location to another are allowable.

28. Travel. Travel costs are allowable for expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business incident to a grant program. Such costs may be charged on an actual basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip, and results in charges consistent with those normally allowed in like circumstances in non-federally sponsored activities. The difference in cost between first-class air accommodations and less-than-first-class air accommodations is unallowable except when less-than-first-class air accommodations are not reasonably available. Notwithstanding the provisions of paragraphs D.6. and 8., travel costs of officials covered by those paragraphs, when specifically related to grant programs, are allowable with the prior approval of a grantor agency.

C. Costs allowable with approval of grantor agency.

1. Automatic data processing. The cost of data processing services to grant programs is allowable. This cost may include rental of equipment or depreciation on grantee-owned equipment. The acquisition of equipment, whether by outright purchase, rental-purchase agreement or other method of purchase, is allowable only upon specific prior approval of the grantor Federal agency as provided under the selected item for capital expenditures.

2. Building space and related facilities. The cost of space in privately or publicly owned buildings used for the benefit of the grant program is allowable subject to the conditions stated below. The total cost of space, whether in a privately or publicly owned building, may not exceed the rental cost of comparable space and facilities in a privately-owned building in the same locality. The cost of space procured for grant program usage may not be charged to the program for periods of

nonoccupancy, without authorization of the grantor Federal agency.

a. Rental cost. The rental cost of space in a privately-owned building is allowable. Similar costs for publicly owned buildings newly occupied on or after October 1, 1980, are allowable where "rental rate" systems, or equivalent systems that adequately reflect actual costs, are employed. Such charges must be determined on the basis of actual cost (including depreciation based on the useful life of the building, interest paid or accrued, operation and maintenance, and other allowable costs). Where these costs are included in rental charges, they may not be charged elsewhere. No costs will be included for purchases or construction that were originally financed by the Federal Government.

b. Maintenance and operation. The cost of utilities, insurance, security, janitorial services, elevator service, upkeep of grounds, normal repairs and alterations and the like, are allowable to the extent they are not otherwise included in rental or other charges for space.

c. Rearrangements and alterations. Costs incurred for rearrangement and alteration of facilities required specifically for the grant program or those that materially increase the value or useful life of the facilities (Section C.3.) are allowable when specifically approved by the grantor agency.

d. Depreciation and use allowances on publicly-owned buildings. The costs are allowable as provided in Section B.11.

e. Occupancy of space under rental-purchase or a lease with option-to-purchase agreement. The cost of space procured under such arrangements is allowable when specifically approved by the Federal grantor agency.

3. Capital expenditures. The cost of facilities, equipment, other capital assets, and repairs which materially increase the value or useful life of capital assets is allowable when such procurement is specifically approved by the Federal grantor agency. When assets acquired with Federal grant funds are (a) sold; (b) no longer available for use in a federally-sponsored program; or (c) used for purposes not authorized by the grantor agency, the Federal grantor agency's equity in the asset will be refunded in the same proportion as Federal participation in its cost. In case any assets are traded on new items, only the net cost of the newly-acquired assets is allowable.

4. Insurance and indemnification.

a. Costs of insurance required, or approved and maintained pursuant to the grant agreement, are allowable.

b. Costs of other insurance in connection with the general conduct of activities are allowable subject to the following limitations:

(1) Types and extent and cost of coverage will be in accordance with general State or local government policy and sound business practice.

(2) Costs of insurance or of contributions to any reserve covering the risk of loss of, or damage to, Federal Government property are unallowable except to the extent that the grantor agency has specifically required or approved such costs.

c. Contributions to a reserve for a self-insurance program approved by the Federal grantor agency are allowable to the extent that the type of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks.

d. Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the grant agreement. However, costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound management practice, and minor losses not covered by insurance, such as spoilage, breakage and disappearance of small hand tools which occur in the ordinary course of operations, are allowable.

e. Indemnification. Includes securing the grantee against liabilities to third persons and other losses not compensated by insurance or otherwise. The Government is obligated to indemnify the grantee only to the extent expressly provided for in the grant agreement, except as provided in d. above.

5. Management studies. The cost of management studies to improve the effectiveness and efficiency of grant management for ongoing programs is allowable except that the cost of studies performed by agencies other than the grantee department or outside consultants is allowable only when authorized by the Federal grantor agency.

6. Preagreement costs. Costs incurred prior to the effective date of the grant or contract, whether or not they would have been allowable thereunder if incurred after such date, are allowable when specifically provided for in the grant agreement.

7. Professional services. Costs of professional services rendered by individuals or organizations not a part of the grantee department are allowable subject to such prior authorization as may be required by the Federal grantor agency.

8. Proposal costs. Costs of preparing proposals on potential Federal Government grant agreements are allowable when specifically provided for in the grant agreement.

D. Unallowable costs.

1. Bad debts. Any losses arising from uncollectible accounts and other claims, and related costs, are unallowable.

2. Contingencies. Contributions to a contingency reserve or any similar provision for unforeseen events are unallowable.

3. Contributions and donations. Unallowable.

4. Entertainment. Costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodgings, rentals, transportation, and gratuities, are unallowable.

5. Fines and penalties. Costs resulting from violations of, or failure to comply with Federal, State and local laws and regulations are unallowable.

6. Governor's expenses. The salaries and expenses of the Office of the Governor of a State, or the chief executive of a political subdivision, are considered a cost of general State or local government and are unallowable. However, for a federally-recognized Indian tribal government, only that portion of the salaries and expenses of the office of the chief executive that is a cost of general government is unallowable. The portion of salaries and expenses directly attributable to managing and operating programs by the chief executive and his staff is allowable. The allowable portion shall be determined by the Federal cognizant agency and the Indian government representatives on a reasonable basis.

7. Interest and other financial costs. Interest on borrowings (however represented), bond discounts, cost of financing and refinancing operations, and legal and professional fees paid in connection therewith, are unallowable except when authorized by Federal legislation and except as provided for in paragraph C.2.a. of this Attachment.

8. Legislative expenses. Salaries and other expenses of the State legislature or similar local governmental bodies such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction, are unallowable.

9. Underrecovery of costs under grant agreements. Any excess of cost over the Federal contribution under one grant agreement is unallowable under other grant agreements.

PART 201—CHAPTER 1—MIGRANT EDUCATION PROGRAM

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AUTHORITY: 20 U.S.C. 2781-2782, unless otherwise noted.

SOURCE: 50 FR 18406, Apr. 30, 1985, unless otherwise noted.

Subpart A—Applying for Chapter 1 Migrant Education Program Funds

GENERAL

§ 201.1 Purpose.

The Migrant Education Program, authorized by sections 1201 and 1202 of Chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 is designed to—

(a) Provide financial assistance to State educational agencies (SEAs) to establish or improve programs of education designed to meet the special educational needs of migratory children of migratory agricultural workers (including migratory agricultural dairy workers) or migratory fishers; and

(b) Enable these SEAs to coordinate their migrant education programs and local migrant education projects with similar programs and projects in other States, including the transfer of school records and other information about eligible migratory children.

(Authority: 20 U.S.C. 2781)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43223, Oct. 23, 1989]

§ 201.2 Regulations that apply.

The following regulations apply to the Chapter 1—Migrant Education Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR part 76 (State-Administered Programs) as follows:

(i) Subpart A (General), except for § 76.3 (ED general grant regulations apply to these programs).

(ii) Sections 76.125 through 76.137 (Consolidated Grant Applications for Insular Areas).

(iii) Section 76.401 (Disapproval of an application—opportunity for a hearing).

(iv) Subpart F (What Conditions Must be Met by the State and its Subgrantees?), except for the following sections:

(A) Sections 76.580 through 76.581 (Coordination).

(B) Sections 76.650 through 76.662 (Participation of Students Enrolled in Private Schools).

(C) Section 76.684 (Day care services).

(D) Section 76.690 (Energy conservation awareness).

(v) Subpart G (What Are the Administrative Responsibilities of the State and Its Subgrantees?), except for the following sections:

(A) Sections 76.770 through 76.772 (State Administrative Responsibilities).

(B) Section 76.780 (A State shall adopt complaint procedures).

(C) Section 76.781 (Minimum complaint procedures).

(D) Section 76.782 (An organization or individual may file a complaint).

(vi) Subpart H (What Procedures Does the Secretary Use to Get Compliance?).

(2) 34 CFR part 77 (Definitions that Apply to Department Regulations).

(3) 34 CFR part 78 (Education Appeal Board).

(4) 34 CFR part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), unless a State formally adopts its own written fiscal and administrative requirements for expending and accounting for all funds received by SEAs and operating agencies under this part. These requirements must be available for Federal inspection and must—

(i) Be sufficiently specific to ensure that funds received under this part are used in compliance with all applicable statutory and regulatory provisions;

(ii) Ensure that funds received under this part are only spent for reasonable and necessary costs of operating programs under this part; and

(iii) Ensure that funds received under this part are not used for general expenses required to carry out other responsibilities of State or local governments.

(6) 34 CFR part 81 (General Education Provisions Act—Enforcement).

(7) 34 CFR part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements For Drug-Free Workplace (Grants)).

(b) The regulations in this part 201.

(Authority: 20 U.S.C. 2781, 2831)

[54 FR 43224, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.2 paragraph (a)(5) was amended by removing "LEAs" and adding, in its place, the words "operating agencies", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.3 Definitions for this program.

(a) *Definitions in the Elementary and Secondary Education Act.* The following terms used in this part are defined in section 1471 of the Act:

Equipment
Free public education
Local educational agency (LEA)
Parent
Parent advisory council
Secretary
State educational agency (SEA)

(b) *Other definitions.* In addition to the terms defined in the applicable regulations listed in § 201.2, or referred to in paragraph (a) of this section, the following definitions apply to this part:

Act means Elementary and Secondary Education Act of 1965, as amended.

Agricultural activity means:

(1) Any activity directly related to the production or processing of crops, dairy products, poultry, or livestock for initial commercial sale or as a principal means of personal subsistence;

(2) Any activity directly related to the cultivation or harvesting of trees; or

(3) Any activity directly related to fish farms.

Chapter 1 means Chapter 1 of Title 1 of the Act.

Children means—

(1) Persons up through age 21 who are entitled to a free public education through grade 12; and

(2) Preschool children.

Currently migratory child means a child:

(1) Whose parent or guardian is a migratory agricultural worker or a migratory fisher; and

(2) Who has moved within the past 12 months from one school district to another—or, in a State that is comprised of a single school district, has moved from one school administrative area to another—to enable the child, the child's guardian, or a member of the child's immediate family to obtain temporary or seasonal employment in an agricultural or fishing activity. This definition includes a child who has been eligible to be served under the requirements in the preceding sentence, and who, without the parent or guardian, has continued to migrate annually to enable him or her to secure temporary or seasonal employment in an agricultural or fishing activity. This definition also includes children of migratory fishermen, if those children reside in a school district of more than 18,000 square miles and migrate a distance of 20 miles or more to temporary residences to engage in fishing activity.

Fiscal Year means the Federal fiscal year—a period beginning on October 1 and ending on the following September 30—or another 12-month period normally used by the SEA for recordkeeping.

Fishing activity means any activity directly related to the catching or processing of fish or shellfish for initial commercial sale or as a principal means of personal subsistence.

Formerly migratory child means a child who:

(1) Was eligible to be counted and served as a currently migratory child within the past five years, but is not now a currently migratory child; and

(2) Has the concurrence of his or her parent or guardian to continue to be considered a migratory child.

Guardian means a person who:

(1) Has been appointed to be the legal guardian of a child through formal proceedings in accordance with State law;

(2) An SEA determines would be appointed to be the legal guardian of a

child under the law of the child's domiciliary State if formal guardianship proceedings were undertaken; or

(3) Is standing in the place of a parent to a child.

Migratory agricultural worker means a person who has moved within the past 12 months from one school district to another—or, in a State that is comprised of a single school district, has moved from one school administrative area to another—to enable him or her to obtain temporary or seasonal employment in an agricultural activity (including dairy work).

Migratory children means children who qualify under either the definition of "currently migratory child" or "formerly migratory child" described in this section.

Migratory fisher means a person who has moved within the past 12 months from one school district to another—or, in a State that is comprised of a single school district, has moved from one school administrative area to another—to enable him or her to obtain temporary or seasonal employment in a fishing activity.

Operating agency means:

(1) A local educational agency (LEA) to which an SEA makes a subgrant of migrant education program funds;

(2) A public or nonprofit private agency with which an SEA or the Secretary makes an arrangement to carry out a migrant education project; or

(3) An SEA, if the SEA operates the State's migrant education program or projects directly.

Preschool children means children who are—

(1) Below the age and grade level at which the agency provides free public education; and

(2) Of the age or grade level at which they can benefit from an organized educational program provided in a school or educational setting.

(Authority: 20 U.S.C. 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43224, Oct. 23, 1989; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.3(b) the definition of "Preschool children" was amended amended by removing the wod "instructional" wherever it appeared and adding, in its place, the word "educational", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§§ 201.4—201.9 [Reserved]

APPLYING FOR A STATE GRANT

§ 201.10 Eligibility of an SEA to participate as a grantee.

(a) An SEA may apply to the Secretary for a grant to operate a State migrant education program directly, through subgrants to LEAs, or through subgrants or other arrangements with public or nonprofit private agencies.

(b) Two or more SEAs may apply jointly for a grant to support a migrant education program that benefits eligible migratory children in those States.

(Authority: 20 U.S.C. 2781)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43224, Oct. 23, 1989]

§ 201.11 Documents an SEA must submit to receive a grant.

(a) *General.* An SEA that wishes to receive funds under this part for an SEA program designed to meet the special educational needs of migratory children shall submit and annually update an application to the Secretary that meets the requirements in section 1202(a) of the Act.

(b) *SEA assurances.* The SEA shall also provide assurances, which will remain in effect for the duration of its participation in the program under this part, that the SEA will—

(1) Meet the requirements in section 435(b)(2) and (5) of the General Education Provisions Act (GEPA) as they relate to fiscal control and fund accounting procedures;

(2) Meet the requirements of section 1202(a)(5) of Chapter 1 that provision be made for the preschool educational needs of migratory children;

(3) Carry out the evaluation requirements in §§ 201.51 through 201.56; and

(4) Ensure that its subgrantee agencies comply with all applicable statutory and regulatory requirements.

(c) *SEA application.* To receive a Chapter 1 migrant education program grant, an SEA shall submit to the Secretary an application to cover a period of not more than three fiscal years, including the first fiscal year for which a grant is made under that application. During subsequent years, the SEA's application must incorporate any updating reports arising from significant changes in the number or needs of children to be served, or the services to be provided.The application must be specific and contain sufficient information to allow the Secretary to determine whether the State's program and projects will satisfy the requirements of Chapter 1 and the applicable regulations for each year.

(d) *Further updating of information in the application.* If, during the course of the project year, there are significant changes in number or needs of the children to be served or the services to be provided, the SEA shall submit a description of those changes to the Secretary together with the impact of the changes on the chapter 1 migrant education budget, program, and projects.

(Approved by the Office of Management and Budget under control number 1810-0029)

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 1232d(b)(2), (5), 2722, 2729(b), 2781, 2782, 2731, 2838(c))

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43224, Oct. 23, 1989; 55 FR 6982, Feb. 28, 1990]

§ 201.12 [Reserved]

§ 201.13 Approval of an SEA's application.

(a) *Standards for approval.* The Secretary approves an SEA's application and any updating amendments if the proposed State migrant education program:

(1) Complies with the Chapter 1 statute and the applicable regulations;

(2) Is designed to meet the special educational needs of eligible migratory children; and

(3) Holds reasonable promise of making substantial progress toward meeting those needs.

(b) *Effect of approval.* The Secretary's approval of an application under this section requires the SEA to perform in accordance with its application, application requirements, and updating amendments, if any.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2781, 2782)

§§ 201.14—201.15 [Reserved]

APPLYING TO AN SEA FOR A SUBGRANT

§ 201.16 Documents that an operating agency must submit to apply for a subgrant.

An operating agency that desires to receive a subgrant shall submit to the SEA, under the procedures in § 201.17, a project application that is developed in consultation with teachers and parents, and that is specific enough to allow the SEA to determine if the proposed local migrant education project satisfies the applicable requirements in the Chapter 1 statute, the applicable regulations, and the provisions of the approved SEA application.

(Approved by the Office of Management and Budget under control number 1810-0504)

(Authority: 20 U.S.C. 2722, 2781)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989]

EFFECTIVE DATE NOTE: At 54 FR 43225, October 23, 1989, § 201.16 was amended by removing "LEA" in the heading and the text and adding, in its place, the words "operating agency", adding the words "developed in consultation with teachers and parents, and that is" before the word "specific", and revising the authority citation, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

§ 201.17 Submission of a project application to the SEA.

(a) *Frequency of submission.* An LEA, or other operating agency, shall submit a project application to the SEA for a period of not more than three fiscal years, including the first fiscal year for which a subgrant would be made under that application.

(b) *Contents of the application.* The project application must include—

(1) Information consistent with the SEA's approved application regarding—

(i) The operating agency's separate annual assessments of the educational needs of its currently and formerly migratory children and the selection of children with the greatest needs (consistent with the service priorities in § 201.31);

(ii) A description of the local Chapter 1 migrant education project to be conducted and how those projects will meet the general instructional program goals the SEA has established. The description must contain—

(A) A separate summary of the project's components that are designed to meet the unmet needs of the currently migratory children expected to be served; and

(B) An estimate of the number of currently migratory children expected to participate in each component; and

(iii) A description of the desired outcomes in terms of basic and more advanced skills that participating children are expected to master and in terms of related support services the LEA will provide;

(2) A budget for the expenditure of Chapter 1—Migrant Education Program funds that, to the extent possible, separately summarizes the estimated costs of project components that would benefit the currently migratory children the agency plans to serve;

(3) Assurances that—

(i) The programs and projects described in the application have been planned and will be carried out in a manner consistent with the requirements in §§201.35 and 201.36; and

(ii) If appropriate, the agency has established procedures to ensure comparability of services as required by § 201.44;

(4) The assurances in section 436(b)(2) and (b)(3) of GEPA as they relate to fiscal control and fund accounting procedures; and

(5) Information the SEA needs to ensure that—

(i) The operating agency's project comports with activities described in the SEA's approved application submitted under § 201.11;

(ii) The operating agency complies with the assurances in paragraphs (b)(3) and (c)(1) of this section; and

(iii) The SEA has data, if those data are not otherwise available to the SEA, that the LEA has maintained effort in accordance with § 201.41.

(c) *Annual updating of information in the application.* An LEA shall annually update its project application by submitting to its SEA:

(1) Data showing that the LEA, if it annually provided services for migratory children, has maintained fiscal effort under § 201.41, if those data are not otherwise available in the SEA;

(2) A budget for the expenditure of Chapter 1 migrant education funds;

(3) Any additional updating resulting from significant changes in the number or needs of children to be served, or the services to be provided; and

(4) Other information that the SEA may request.

(Authority: 20 U.S.C. 2722, 2781, 2782)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989]

EFFECTIVE DATE NOTE: At 54 FR 43225, October 23, 1989, § 201.17 was amended by revising the section heading, paragraphs (a), (b), (c)(1), and the authority citation, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. For the convenience of the user the superseded text is set forth as follows:

§ 201.17 Submission of an LEA's project application to the SEA.

(a) *Frequency of submission.* An LEA shall submit a project application to the SEA for a period of not more than three fiscal years, including the first fiscal year for which a subgrant would be made under that application.

(b) *Contents of the application.* The project application must include:

(1) A description of the local Chapter 1 migrant education project to be conducted;

(2) A budget for the expenditure of Chapter 1 migrant education program funds;

(3) The assurances in section 556(b)(2) through (b)(5) of Chapter 1;

(4) The assurances in section 436(b)(2) and (b)(3) of GEPA; and

(5) Information that the SEA needs to ensure that the project comports with activities described in the SEA's application as provided in § 201.12.

(c) * * *

(1) Data showing that the LEA has maintained fiscal effort on the same basis as is required for LEAs by section 558(a) of Chapter 1;

* * * * *

(Authority: Sec. 555, 20 U.S.C. 3804; sec. 556, 20 U.S.C. 3805; sec. 596, 20 U.S.C. 3876; Title I, sec. 142(a), 20 U.S.C. 2762(a))

§ 201.18 Approval of an LEA's project application for a subgrant.

(a) *Standards for approval.* An SEA may approve an LEA's, or other operating agency's, application for a subgrant only if—

(1) The application meets the requirements of § 201.17 and is consistent with the content of the approved SEA application; and

(2) The SEA first determines that the LEA—

(i) Maintained fiscal effort in accordance with § 201.41; or

(ii) If the LEA failed to maintain fiscal effort, has modified or updated its application to take into account any required reduction in the indirect costs that otherwise could be charged to its subgrant.

(b) *Effect of approval.* SEA approval of a project application under paragraph (a) of this section requires the operating agency to administer and operate its project in accordance with its application, any amendments, and project requirements in §§ 201.30-201.35. That approval, however, does not create for the operating agency an entitlement to receive a subgrant for a period other than the first fiscal year.

(Authority: 20 U.S.C. 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.18 paragraph (a)(2)(i) was amended by removing "§ 201.40" and adding, in its place, "§ 201.41", and paragraph (b) was amended by removing "LEAs" wherever it appears and adding, in its place, the words "operating agencies", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.19 [Reserved]

Subpart B—Determining the Amount of Grants and Subgrants

§ 201.20 Amount available for an SEA grant.

(a) *General.* (1) The Secretary determines for each fiscal year the amount of the Chapter 1 migrant education program grant for which the SEA in each State may apply according to section 1201 of chapter 1 and the funds appropriated for grants to States under that section.

(2) In applying section 1201(b)(1) of chapter 1, the Secretary determines for each fiscal year the number of migratory children (as defined in § 201.3) aged three through twenty-one in each State on the basis of statistics from the Migrant Student Record Transfer System (MSRTS) or from any other system that the Secretary determines most accurately and fully reflects the actual number of migratory children residing in the State. Each SEA is required to submit accurate data that are necessary to make these determinations.

(3) If, regardless of funding source, a project exists that is designed to assist migrant families who are in transit to locations in other areas to obtain temporary or seasonal employment in an agricultural or fishing activity, the SEA may enroll migratory children who pass through the project site in

the MSRTS or other system as a resident of the project's State only as follows:

(i) For a child in transit to a location in another State where the employment will be sought, the SEA may enroll the child as a resident of the SEA's own State only for the period the child resides at the project site.

(ii) For a child in transit to a location within its own State where employment will be sought, the State may enroll the child as a resident of the SEA's own State without restriction.

(b) *Special summer formula.* In making the adjustment required by section 1201(b) of chapter 1 to reflect the special needs of migratory children for summer projects and the additional costs of operating those projects, the Secretary uses the best available information from the MSRTS or other system about the cost of operating summer projects and the number of children in each State participating in those projects.

(Approved by the Office of Management and Budget under control number 1810-0520)

(Authority: 20 U.S.C. 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43225, Oct. 23, 1989; 55 FR 6982, Feb. 28, 1990]

§ 201.21 Determination of an SEA grant.

(a) *Estimated cost of a State migrant education program.* (1) An applicant SEA is entitled to receive a Chapter 1 migrant education grant in the amount the Secretary determines for each fiscal year, on the basis of the best information available to the Secretary at the time, is necessary to carry out the activities in its application.

(2) This amount may not exceed the total amount available to that SEA as determined by the Secretary under § 201.20.

(b) *Consideration of the cost of past and future activities and the amount of funds available.* In determining the amount of the Chapter 1 migrant education program grant to which an SEA is annually entitled, the Secretary considers:

(1) The amount for which the SEA may apply, as determined under § 201.20;

(2) The cost of completed program activities under previous migrant education program grants, under section 1201 of Chapter 1, and the number of children who were served;

(3) The estimated cost of activities not yet begun under the preceding grant and the number of children who will be served;

(4) In the case of a request for an increase in the grant that the Secretary previously determined to be necessary to carry out the annual activities in the approved SEA application, the estimated cost of providing additional program services before the end of the grant period and the number of children who would receive additional services;

(5) The unused amount of the SEA's preceding migrant education program grant; and

(6) Any other relevant information.

(Authority: 20 U.S.C. 2781, 2782)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43226, Oct. 23, 1989]

§ 201.22 Reallocation of excess funds.

(a) If the Secretary determines that the annual amount for which an SEA may apply, as determined under § 201.20, is more than the amount needed to carry out the activities in its application for that year, the Secretary may allocate some or all of this excess to one or more other SEAs whose amounts available under §§ 201.20 and 201.21 would otherwise be insufficient to serve the eligible migratory children in those States.

(b) The Secretary notifies an SEA if part of the amount available to it is being considered for reallocation. The SEA may—within 15 days after receiving that notice—request an opportunity to explain why a reallocation is not warranted. If the SEA does not request an opportunity to explain, or if—after the explanation—the Secretary determines that the total amount available to the SEA for that fiscal year exceeds the amount needed, the Secretary may reallocate the amount in excess.

(Authority: 20 U.S.C. 2781, 2782)

§ 201.23 Amount available for State administration.

(a) Except for programs under Part C of Chapter 1 and as provided in paragraph (b) of this section, an SEA shall use funds received under section 1404(a) of the Act for the proper and efficient performance of its duties under Chapter 1.

(b) The SEA may not use more than 15 percent of the funds referred to in paragraph (a) of this section for indirect costs.

(Authority: 20 U.S.C. 2781, 2782, 2824)

[54 FR 43226, Oct. 23, 1989]

§ 201.24 Secretary's special arrangement for services (bypass).

(a) *General.* The Secretary may make a special arrangement with one or more public or nonprofit private agencies to carry out the migrant education program in a State if the Secretary determines that:

(1) An SEA is unwilling or unable to conduct an educational program for the migratory children who are eligible to be served;

(2) The arrangement would result in more efficient and economic administration of the program; or

(3) The arrangement would add substantially to the welfare or educational attainment of the migratory children who are eligible to be served.

(b) *Availability of funds.* The Secretary may use all or part of the total amount of the Chapter 1 migrant education program grant available to the affected SEA—under §§ 201.20 and 201.21—to make one or more special arrangements.

(c) *Notice to the SEA.* The Secretary does not make a special arrangement until after the affected SEA has had reasonable notice and an opportunity for a hearing.

(d) *Obligations of the operating agency.* If the Secretary makes a special arrangement for services through a public or nonprofit private agency, that operating agency shall administer its project in a manner consistent with an SEA's obligations under the regulations in this part.

(Authority: 20 U.S.C. 2782)

§ 201.25 Amount of a subgrant.

(a) In determining the amount of a subgrant to an LEA or other operating agency, the SEA shall first consider the relative needs of all operating agencies in the State that would operate migrant education projects in terms of—

(1) The numbers of currently and formerly migratory children with identified special educational needs who reside within the area served by the LEA, or other agency, in sufficient concentrations to warrant implementation of a migrant education project designed to meet those needs; and

(2) The nature, scope, and cost of the proposed projects designed to meet the needs of these currently migratory children, as described in the operating agency's approved subgrant application;

(b) Before distributing any Migrant Education Program funds to pay the supplemental costs of projects that arise because of the participation of formerly migratory children, the SEA shall ensure that the amount of each sub-grant to be awarded will be at least enough to pay the costs of projects designed to meet the unmet special educational needs of all significant concentrations of currently migratory children residing in the areas the LEA serves.

(c) Provided the amount of each subgrant satisfies the requirement of paragraph (b) of this section, the SEA shall determine the amount of a subgrant to an LEA, using procedures it considers appropriate, based on—

(1) The total number of migratory children who—

(i) Are expected to be served by the project; or

(ii) Are estimated to reside in the area served by the agency that operates the project;

(2) The nature, scope, and cost of the proposed project;

(3) The availability of funds and services from other sources; and

(4) Any other relevant criteria developed by the SEA, consistent with the service priorities in § 201.31, including the SEA's priorities concerning ages and grade levels of children to be

served, areas of the State to be served, and types of services to be provided.

(Authority: 20 U.S.C. 2781, 2782, 2831)

[54 FR 43226, Oct. 23, 1989]

Effective Date Note 1: At 54 FR 43226, October 23, 1989, § 201.25 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. For the convenience of the user the superseded text is set forth as follows:

§ 201.25 Amount of a subgrant to an LEA.

An SEA shall determine the amount of a subgrant to an LEA or other agency based on:

(a) The number of children to be served;

(b) The nature, scope, and cost of the proposed project; and

(c) Any other relevant criteria developed by the SEA consistent with the provisions of § 201.31, including the SEA's priorities concerning ages and grade levels of children to be served, areas of the State to be served, and types of services to be provided.

Effective Date Note 2: At 55 FR 22017, May 30, 1990, § 201.25 was amended by removing "LEA" in paragraph (b) and (c) and adding in its place, the words "operating agency", effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date.

(Authority: Sec. 554(a), 20 U.S.C. 3803(a); Title I, secs. 141-142, 20 U.S.C. 2761-2762)

§§ 201.26—201.29 [Reserved]

Subpart C—Project Requirements

§ 201.30 Eligibility of a child to participate.

(a) A child may not be counted under § 201.20, or be provided with Chapter 1 migrant education program services, until an SEA or its operating agency has:

(1) Determined that the child is either a currently or formerly migratory child as defined under § 201.3; and

(2) Indicated in writing how the child's eligibility was determined.

(b) In determining the eligibility of a child, an SEA and its operating agency may seek and obtain credible information from any source, including that provided by the child or his or her parent or guardian. Neither the SEA nor its operating agency is required to obtain documentary proof of either the child's eligibility or civil status from the child or his or her parent or guardian.

(c) The SEA and its operating agencies are responsible for implementing procedures that ensure the correctness of the information on which they and the MSRTS or other system rely. In doing so, the SEA shall—

(1) Ensure that the information is recorded on any certificate of eligibility, including the one developed by the Secretary, that contains the minimum information needed to determine eligibility. If the child's eligibility was determined under § 201.20(a)(3)(i) (relating to recruitment at special stopover sites), the SEA shall also record the length of time the child was expected to reside at the stopover site; and

(2) Implement a process to ensure that the completed certificate of eligibility contains accurate information in sufficient detail to explain to an independent reviewer the basis for the determination that the child is a currently or formerly migratory child under § 201.3.

(d) In the event of an audit of the State's eligibility determinations, the Secretary considers those determinations as well as statistics on the full-time equivalent (FTE) number of migratory children residing in the State to be correct if the total number of children whom the SEA has identified as migratory were correctly identified within a five percent margin of error.

(e) In implementing procedures under paragraph (c) of this section, the SEA is responsible for ensuring that no child who is found to be ineligible for the Migrant Education Program is counted as migratory. However, the SEA is not responsible for auditing its determinations for correctness within the five percent margin of error.

(Approved by the Office of Management and Budget under control number 1810-0520)

(Authority: 2781, 2782, 2831)

[50 FR 18409, Apr. 30, 1985; 50 FR 31592, Aug. 5, 1985, as amended at 54 FR 43226, Oct. 23, 1989; 55 FR 6982, Feb. 28, 1990]

§ 201.31 Service priorities.

(a) Children (aged 3 through 21) who have been determined to be currently migratory must be given priority over formerly migratory children in the consideration of all programs and activities that the SEA, LEA, or other operating agency offers pursuant to its approved application for Migrant Education Program funds.

(b) If, in order to provide migrant education services to preschool currently migratory children or migrant education instructional services to school-aged currently migratory children, it would be necessary to provide day care or similar services to currently migratory children aged two years of age or younger, and no funds—except Chapter 1—Migrant Education Program funds—are available for that purpose, an SEA or an operating agency may provide day care or similar services to those children as if they had a higher priority for services than do formerly migratory children.

(Authority: 20 U.S.C. 2782)

[54 FR 43226, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.31 paragraph (b) was revised, effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user, the superseded text is set forth as follows:

§ 201.31 Service priorities.

* * * * *

(b) If, in order to provide migrant education instructional services to preschool and regular school-aged currently migratory children, it would be necessary to provide day care or similar services to children aged two years or younger who are currently migratory children (or migrant education preschool services to currently migratory children three years of age or over who are not enrolled in instructional programs), and no funds—except Chapter 1—Migrant Education Program funds—are available for that purpose, an SEA or an operating agency may provide day care services to those children as if those children had a higher priority than formerly migratory children.

§ 201.32 Annual needs assessment.

(a) An SEA and any operating agency that receives Chapter 1 migrant education funds shall design and improve their migrant education programs and projects through use of an annual assessment of educational needs. Subject to the special rules for preschool projects in paragraph (e) of this section, in implementing the annual assessment of educational needs, the SEA or operating agency shall on the basis of the best available information—

(1) Identify migrant children or, if this is not possible, the specific characteristics of the children who are expected to reside in the area served by the SEA or operating agency and who are eligible to be counted as migratory children under § 201.20(a);

(2) Identify the general instructional areas and grade levels in which the program or project will focus;

(3) Establish educational criteria that—

(i) Are consistent with the requirements of paragraphs (b) and (c) of this section; and

(ii) For each grade level and instructional area, will be used to select migratory children to participate in the program or project;

(4) To the extent possible, uniformly apply the criteria required in paragraph (a)(3) of this section to particular grade levels;

(5) Select for services those migratory children, consistent with the service priorities in § 201.31, who have the greatest need for Migrant Education Program services; and

(6) Determine—

(i) The special educational needs of migratory children expected to participate with sufficient specificity to permit concentration on those needs; and

(ii) The resources, such as personnel, instructional materials, and library resources, necessary to meet those special educational needs.

(b) In formulating and applying the educational criteria pursuant to paragraphs (a) (3) and (4) of this section, the SEA and operating agency—

(1) Shall consider the differing needs, if any, among—

(i) Currently migratory children based on the effect of migrations on the continuity of their education; and

(ii) Formerly migratory children based on the effect of former migrations on their educational development; and

(2) With regard to currently migratory students, may conduct its annual needs assessment on the basis of the latest available information relevant to the needs of the children expected

to be present at periods of peak enrollment.

(c) The educational criteria referred to in paragraph (a)(3) of this section must be—

(1) For currently migratory children, the most appropriate educationally related objective criteria including, if reasonably possible, the results of written or oral tests; and

(2) For formerly migratory children, educationally related objective criteria, including the results of written or oral tests.

(d) The SEA or operating agency may skip currently or formerly migratory children in greatest need of special assistance if their special educational needs are being met with services provided under other Federal, State, or local programs.

(e) Only paragraphs (a) (1), (2), and (5), and (d) of this section apply to projects the SEA or operating agency establishes to meet the preschool educational needs of migratory children.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2724, 2782)

[54 FR 43226, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.32 paragraph (a) was amended by removing "paragraph (c)" and adding, in its place, "paragraph (e)", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.33 [Reserved]

§ 201.34 Coordination with other migrant programs and projects.

An SEA and its operating agencies shall plan and operate the activities described in their applications in coordination with migrant programs and projects of other groups or agencies that provide services to migrants in the area served by the SEA and its operating agencies, including migrant and seasonal farmworker projects administered under section 418A of the Higher Education Act, section 402 of the Job Training Partnership Act, the Education of the Handicapped Act, the Community Services Block Grant Act, the Head Start Program, the Migrant Health Program, and all appropriate programs of the Departments of Education, Labor, and Agriculture.

(Authority: 20 U.S.C. 2782)

[50 FR 18409, Apr. 30, 1985, as amended at 54 FR 43227, Oct. 23, 1989]

§ 201.35 Requirements for parent involvement.

(a) *General.* State and local agencies that receive Chapter 1—Migrant Education Program funds shall design and implement their programs and projects in consultation with the parents of the children to be served, and shall carry out programs, activities, and procedures for the involvement of parents in their migrant education programs and projects.

(b) *Parent advisory councils.* (1) State and local agencies implementing programs extending for the duration of the school year shall establish a parent advisory council. The council must have a majority of members who are parents (or guardians) of children to be served by the migrant education program or projects and, if feasible, who are elected by the parents of children to be served;

(2) The SEA shall establish procedures to ensure that—

(i) The SEA and the State's operating agencies appropriately consult with, and solicit information from, councils representative of parents of migratory children in the planning, operation, and evaluation of a program or local project; and

(ii) Compliance with this provision at the State and local levels is documented annually in the State or local agency's application for funds or updating information.

(c) *Parental involvement.* Each SEA and operating agency shall, in a manner consistent with paragraphs (a) through (c) and (e) of 34 CFR 200.34, involve parents in meaningful consultation in the design and implementation of the programs and projects.

(Authority: 20 U.S.C. 2726, 2782)

[54 FR 43227, Oct. 23, 1989]

EFFECTIVE DATE NOTE: At 54 FR 43227, October 23, 1989, § 201.35 was revised, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980. For the convenience of the user the superseded text is set forth as follows:

§ 201.35 Requirements for parent involvement.

(a) *General.* An agency that receives Chapter 1 funds shall design and implement its Chapter 1 program or projects in consultation with teachers of children being served and in consultation with the parents of the children being served.

(b) *Requirements for an operating agency advisory council.* An SEA shall require each operating agency to:

(1) Establish and consult with a parent advisory council; and

(2) Solicit actively parental involvement in the planning, operation, and evaluation of its projects.

(c) *Requirements for the State advisory council.* An SEA shall:

(1) Establish and consult with a parent advisory council; and

(2) Solicit actively parental involvement in the planning, operation, and evaluation of the State's migrant education program.

(d) *Advisory council procedures.* The SEA is responsible for ensuring that appropriate procedures are devised and made available to the State's migrant parents for establishment of and consultation with State and local parent advisory councils. Those procedures must be consistent with the requirements of section 125(a) of Title I.

(Authority: Sec. 554(a), 20 U.S.C. 3803(a); sec. 556(b)(3), 20 U.S.C. 3805(b)(3); Title I, sec. 142(a)(4), 20 U.S.C. 2762(a)(4))

§ 201.36 General program requirements.

In developing and implementing its migrant education program and projects, the SEA shall ensure that—

(a)(1) The children selected for services are those with the greatest need for special assistance—

(i) Consistent with the service priorities in § 201.31; and

(ii) As determined, to the maximum extent possible, using the educational criteria required by § 201.32 (annual needs assessment); and

(2) The special educational needs of these children are sufficiently specified to permit the SEA to concentrate on meeting those needs;

(b) The size, scope, and quality of the program and projects offered are sufficient to give reasonable promise of substantial progress toward meetir
the special educational needs of th
migrant children being served;

(c) The results of evaluations a
used to improve the provision of ser
ices to eligible migrant children b
either—

(1) Disapproving an application
continue a project in a succeeding ye
if the project is not making substa
tial progress toward meeting the ed
cational goals of the project and th
part; or

(2) Approving changes in the proje
that will enable the SEA to meet tho
goals;

(d) Services are provided to all si
nificant concentrations of eligible m
gratory children enrolled in priva
schools, consistent with the servi
priorities in § 201.31, in accordan
with the basic objectives of sectio
1017 of the Act;

(e) The SEA allocates time and r
sources for frequent and regular c
ordination of the curriculum und
the migrant education program wit
the regular instructional program; an

(f) In the case of children participa
ing in the migrant education progra
who are also of limited English prof
ciency or are handicapped—

(1) The SEA provides maximum c
ordination between services provide
under the migrant education progra
and other services that are provided
address children's handicapping cond
tions or limited English proficienc
and

(2) The SEA's coordination activiti
are designed to increase program e
fectiveness, eliminate duplication, an
reduce fragmentation of services fc
migratory children.

(Approved by the Office of Manageme
and Budget under control number 181
0519)

(Authority: 20 U.S.C. 2722, 2724, 2729, 278
2831)

[54 FR 43227, Oct. 23, 1989, as amended
55 FR 6982, Feb. 28, 1990]

§§ 201.37—201.39 [Reserved]

Subpart D—Administrative and Fiscal Requirements

Source: 54 FR 43228, Oct. 23, 1989, unless otherwise noted.

§ 201.40 Prohibition against using Chapter 1 funds to provide general aid.

An LEA or other operating agency that has received assistance from an SEA may use Chapter 1 funds provided under this part only for projects that are designed and implemented to meet the special educational needs of migratory children who are identified and selected for services in accordance with the provisions in this part.

(Authority: 20 U.S.C. 2781, 2782)

§ 201.41 Maintenance of effort.

(a) (1) *Basic standard.* Before an SEA may provide an LEA a subgrant for the operation of a migrant education project, the SEA must find either that the LEA's combined fiscal effort per student or its aggregate expenditures of State and local funds with respect to the provision of free public education for the preceding fiscal year was not less than 90 percent of the LEA's combined fiscal effort per student or the aggregate expenditures of State and local funds for the second preceding fiscal year.

(2) *Meaning of preceding fiscal year.* For purposes of determining maintenance of effort, the "preceding fiscal year" is the Federal fiscal year, or 12-month period most commonly used in a State for official reporting purposes, prior to the beginning of the Federal fiscal year in which funds are available.

Example: For funds first made available on July 1, 1989, if a State is using the Federal fiscal year, "the preceding fiscal year" is the Federal fiscal year 1988 (which began on October 1, 1987) and the "second preceding fiscal year" is fiscal year 1987 (which began on October 1, 1986). If a State is using a fiscal year that begins on July 1, 1989, the "preceding fiscal year" is the 12-month period ending on June 30, 1988 and the "second preceding fiscal year" is the 12-month period ending on June 30, 1987.

(3) *Expenditures*—(i) *To be considered.* In determining an LEA's compliance with the maintenance of effort requirement, the SEA shall consider the LEA's expenditures from State and local funds for free public education. These include expenditures for administration, instruction, attendance, health services, pupil transportation, plant operation and maintenance, fixed charges, and net expenditures to cover deficits for food services and student body activities.

(ii) *Not to be considered.* The SEA may not consider the following expenditures in determining the LEA's compliance with the maintenance of effort requirement:

(A) Any expenditures for community services, capital outlay, or debt service.

(B) Any expenditures made from funds provided under Chapter 1 and Chapter 2 of Title I of the Act or Chapter 1 and Chapter 2 of the ECIA.

(b) *Failure to maintain effort.* (1) If an LEA fails to maintain effort as provided in paragraph (a) of this section, and a waiver under § 201.42 is not granted, the SEA shall reduce the LEA's subgrant with respect to the amount allowed for its indirect costs under 34 CFR 76.563 by 50 percent.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year in which the LEA failed to maintain effort, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

Example: In Federal fiscal year 1990, an LEA fails to maintain effort because its fiscal effort in the preceding fiscal year (1988) (see example in paragraph (a)(2) of this section) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987). In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's fiscal effort in the second preceding fiscal year (1988) (the year that caused the LEA's failure to maintain effort) to be no less than 90 percent of the LEA's expenditure in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728, 2782, 2831)

§ 201.42 Waiver of the maintenance of effort requirement.

(a) (1) An SEA may waive, for one fiscal year only, the maintenance of effort requirement applying to an LEA in § 201.41, if the SEA determines that a waiver would be equitable due to exceptional or uncontrolled circumstances. These circumstances include, but are not limited to, the following:

(i) A natural disaster.

(ii) A precipitous and unforeseen decline in the financial resources of the LEA.

(2) An SEA may not consider tax initiatives or referenda to be exceptional or uncontrollable circumstances.

(b) (1) If the SEA grants a waiver under paragraph (a) of this section, the SEA may not reduce the amount of migrant education funds the LEA is otherwise entitled to receive.

(2) In determining maintenance of effort for the fiscal year immediately following the fiscal year for which the waiver was granted, the SEA shall consider the LEA's fiscal effort for the second preceding fiscal year to be no less than 90 percent of the combined fiscal effort per student or aggregate expenditures (using the measure most favorable to the LEA) for the third preceding fiscal year.

EXAMPLE: In fiscal year 1990, an LEA secures a waiver because its fiscal effort in the preceding fiscal year (1988) (see example in § 201.41 (a)(2)) is less than 90 percent of its fiscal effort in the second preceding fiscal year (1987) due to exceptional or uncontrollable circumstances. In assessing whether the LEA maintained effort during the next fiscal year (1991), the SEA may consider the LEA's expenditures for the second preceding fiscal year (1988) (the year for which the LEA needed a waiver) to be no less than 90 percent of the LEA's expenditures in the prior fiscal year (1987).

(Authority: 20 U.S.C. 2728, 2782, 2831)

§ 201.43 Supplement, not supplant.

(a) Except as provided in § 201.45(a)(1), an agency that receives migrant education funds available under this part may use those funds only to supplement and, to the extent practicable, increase the level of non-Federal funds that would, in the absence of migrant education funds, be made available for the education of pupils participating in migrant education projects, and in no case may migrant education funds be used to supplant those non-Federal funds.

(b) To meet the requirement in paragraph (a) of this section, an operatin agency is not required to provide services under this part through the use o a particular instructional method or i a particular instructional setting.

(Authority 20 U.S.C. 2728, 2782, 2831)

[54 FR 43228, Oct. 23, 1989, as amended a 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 2201 May 30, 1990, in § 201.43 paragraph (b) wa amended by removing "LEA" and adding, i its place, the words "operating agency", effective either 45 days after publication i the FEDERAL REGISTER or later if Congres takes certain adjournments. The Department of Education will publish a documen in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.44 Comparability.

(a) Except as provided in paragrap (b) of this section and § 201.45, an operating agency may receive Migran Education Program funds only if th operating agency uses State and loca funds to provide services to student receiving Migrant Education Progran services that, taken as a whole, are a least comparable to services being provided to students, enrolled in the sam grade levels of all of the operatin agency's schools, which are not receiving Migrant Education Program funded services.

(b) (1) An operating agency is considered to have met the comparabilit requirements in paragraph (a) of thi section, if it either—

(i) Files with the SEA a written assurance that it has established and implemented—

(A) A district-wide salary schedule;

(B) A policy to ensure equivalenc among schools in teachers, administrators, and auxiliary personnel; and

(C) A policy to ensure equivalenc among schools in the provision of curriculum materials and instructiona supplies; or

(ii) Establishes and implement other measures for determining compliance as the SEA may approve.

(2) In determining compliance with paragraph (a) of this section, an operating agency does not need to consider unpredictable changes in student enrollment or personnel assignments that occur after the beginning of a school year.

(c) (1) An operating agency shall develop written procedures to ensure compliance with paragraph (a) of this section.

(2) The written procedures ensuring compliance with paragraph (a) of this section must include a process for demonstrating that State and local funds are used to provide services to students receiving Migrant Education Program services that are at least comparable to the services provided to students in the same grades who are not receiving Migrant Education Program funds.

(d) An operating agency shall maintain annual records documenting compliance with paragraph (a) of this section.

(e) In accordance with the rulemaking requirements in § 201.46, an SEA may establish standards to ensure that an operating agency's policies under paragraph (c) of this section result in the provision of equivalent staffing, materials, and supplies among the schools of the operating agency.

(f) (1) The SEA shall monitor each LEA's compliance with the comparability requirements.

(2) If an operating agency is found not to be in compliance with the comparability requirements, the amount to be withheld or repaid is the amount or percentage by which the operating agency failed to comply with the measures established under paragraph (b) of this section.

(Authority: 20 U.S.C. 2728(c), (d), 2782, 2831)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

Effective Date Note 1: At 54 FR 43228, October 23, 1989, § 201.44 was added, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

Effective Date Note 2: At 55 FR 22017, May 30, 1990, § 201.44 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date.

§ 201.45 Excluding special State and local funds from supplement, not supplant and comparability determinations.

(a) *General rule.* (1) For the purpose of determining compliance with the supplement, not supplant requirement in § 201.43 and the comparability requirement in § 201.44, an operating agency may exclude State and local funds spent in carrying out the following types of programs:

(i) Special State programs designed to meet the special educational needs of migratory children, including compensatory education for migratory children, that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(1)(8) of the Act.

(ii) Special local programs designed to meet the special educational needs of migratory children, including compensatory education for migratory children, that the SEA has determined in advance under paragraph (c) of this section meet the requirements in section 1018(d)(1)(B) of the Act.

(2) For the purpose of determining compliance with the comparability requirements in § 201.44 only, an operating agency may also exclude State and local funds spent in carrying out the following types of programs:

(i) Bilingual education for children of limited English proficiency.

(ii) Special education for handicapped children.

(iii) State phase-in programs that the Secretary has determined in advance under paragraph (b) of this section meet the requirements in section 1018(d)(2)(B) of the Act.

(b) *Secretarial determination regarding State programs.* (1) In order for an operating agency to exclude State and local funds spent on State programs under paragraphs (a)(1)(i) and (a)(2)(iii) of this section, an SEA shall request the Secretary to make an advance determination of whether—

(i) A special State program under paragraph (a)(1) of this section meets the requirements in section 1018(d)(1)(B) of the Act; and

(ii) A State phase-in program under paragraph (a)(2)(iii) of this section meets the requirements in section 1018(d)(2)(B) of the Act.

(2) Before making the determination, the Secretary requires the SEA to submit copies of the State law and implementing rules, regulations, orders, guidelines, and interpretations that the Secretary may need to make the determination.

(3) The Secretary makes the determination in writing and includes the reasons for the determination.

(4) If there is any material change in the pertinent State law affecting the program, the SEA shall submit those changes to the Secretary.

(c) *SEA determination regarding local programs.* (1) In order for an operating agency to exclude State and local funds spent on a special local program under paragraph (a)(1)(ii) of this section, the operating agency shall request the SEA to make an advance determination of whether that program meets the requirements in section 1018(d)(1)(B) of the Act.

(2) Before making a determination, the SEA shall require the operating agency to submit copies of the State law and implementing rules, regulations, orders, guidelines, and interpretations that the SEA may need to make the determination.

(3) The SEA shall make the determination in writing and include the reasons for its determination.

(4) If there is any material change in the pertinent local requirements affecting the program, the operating agency shall submit those changes to the SEA.

(Authority: 20 U.S.C. 2728 (b), (c), (d), 2782)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, § 201.45 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.46 State rulemaking and other SE
responsibilities.

(a) An SEA is responsible for ensu
ing that the agencies that receiv
Chapter 1—Migrant Education Pr
gram funds in the State comply wit
all statutory and regulatory provisio
applicable to Chapter 1.

(b)(1) Except as provided in par
graph (c) of this section, Chapter
does not preempt, prohibit, or encou
age State rules, regulations, or polici
issued pursuant to State law.

(2) If a State issues rules, regul
tions, or policies, they must be consis
ent with the provisions of the follo
ing:

(i) The Chapter 1 statute.

(ii) The regulations in this part.

(iii) Other applicable Federal sta
utes and regulations.

(iv) The SEA application approv
under § 201.13.

(c)(1) Unless needed to impleme
SEA responsibilities in its approv
State application or in the Chapter 1
Migrant Education Program statute
regulations, a State may not iss
rules, regulations, or policies that lim
LEAs' decisions affecting funds
ceived under this part regarding—

(i) Grade levels to be served;

(ii) Basic skill areas to be addresse

(iii) Instructional settings, materia
or teaching techniques to be used;

(iv) Instructional staff to be e
ployed, as long as the staff mee
State certification and licensing
quirements for education personnel;

(v) Other essential support services

(2) For purposes of this section, de
sions concerning the planning, imp
mentation, and evaluation of migra
education programs and projects co
ducted at the local operating agen
level are not "LEA decisions" unl
the SEA determines that the LEA
other operating agency has authori
to make these decisions.

(d) The imposition of any State r
or policy relating to the administ
tion and operation of the Chapter
Migrant Education Program, includi
those based on State interpretation
any Federal law, regulation, or gui
line, must be identified as a State-i
posed requirement.

e)(1)(i) Except as provided in para-
aphs (e)(1)(ii) and (e)(1)(iii) of this
:tion, if a State issues major rules or
gulations relating to the administra-
in or operation of programs funded
ide this part, the State shall con-
ne a State committee of practition-
s to review before publishing any
ajor proposed or final rule or regula-
n.

(ii) In an emergency situation in
ich a major rule or regulation must
issued within a very limited time to
sist agencies with the operation of
ograms under this part, the State—

(A) May issue the regulation without
nsulting the committee of practi-
oners; but

(B) Shall immediately thereafter
nvene the State committee of practi-
oners to review the emergency rule
regulation prior to issuance in final
rm.

(iii) The State shall ensure that the
mmittee of practitioners reviews
on-major rules or regulations before
ublication.

(2) If a State does not issue rules or
gulations relating to the administra-
on or operation of programs under
is part but issues policies that the
EA and local operating agencies are
quired to follow, the State must
omply with the requirements in this
ection for issuing rules and regula-
ions.

(3)(i) The committee of practitioners
ust include—

(A) Administrators;

(B) Teachers;

(C) Parents;

(D) Member of local boards of edu-
ation; and

(E) Representatives of private school
hildren; and

(ii) A majority of the committee
nust be representatives of LEAs or
ther operating agencies.

(iii) SEAs are encouraged to request
rom appropriate organizations recom-
nendations for membership on the
ommittee.

Authority: 20 U.S.C. 2782, 2831, 2851)

§ 201.47 Complaint procedures for an SEA.

(a) An SEA shall adopt written pro-
cedures for—

(1) Receiving and resolving any complaint that the SEA or an operating agency is violating a Federal statute or regulations that apply to programs under this part;

(2) Reviewing an appeal from a decision of an operating agency with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the SEA determines that an on-site investigation is necessary.

(b) An SEA shall include in its complaint procedures—

(1) A time limit of 60 calendar days after the SEA receives a complaint—

(i) If necessary, to carry out an independent on-site investigation; and

(ii) To resolve the complaint;

(2) An extension of the time limit under paragraph (b)(1) of this section only if exceptional circumstances exist with respect to a particular complaint; and

(3) The right to request the Secretary to review the final decision of the SEA.

(c) An organization or individual may file a written signed complaint with an SEA. The complaint must include—

(1) A statement that the SEA or an operating agency has violated a requirement of a Federal statute or regulations that apply to the Chapter 1—Migrant Education Program; and

(2) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

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Effective Date Note 2: At 55 FR 22017, May 30, 1990, § 201.47 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. The Department of Education will publish a document in the Federal Register at a later date, announcing the effective date.

§ 201.48 Allowable costs using program funds.

(a) To administer its migrant education program for migratory children, an SEA may use the funds made available for the State migrant education program under § 201.21 only to perform those functions that are unique to the migrant education program or that are the same or similar to the functions performed by LEAs in the State under 34 CFR part 200.

(b) These functions include, but are not limited—

(1) Statewide identification and recruitment of eligible migratory children;

(2) Interstate and intrastate coordination of the State migrant education program and its local projects with other State programs and local projects;

(3) Coordinating project level activities with other public and private agencies;

(4) Implementing the migrant student record transfer system;

(5) Processing reports that are submitted by the operating agencies to the SEA;

(6) Maintaining inventories of property acquired with Migrant Education Program funds;

(7) Negotiating awarding of contracts; and

(8) Evaluating activities of the State migrant education program, other than the design of evaluation report forms and final preparation of the SEA's evaluation report to the Secretary.

(Authority: 20 U.S.C. 2781, 2782, 2831)

§ 201.49 Persons to be assigned non-Chapter 1 duties.

(a) An operating agency may assign public school personnel paid entirely with migrant education funds to limited supervisory duties that may provide some benefit to children not participating in the migrant education project if—

(1) Similarly situated personnel at the same school site, who are not paid with Chapter 1—Migrant Education Program funds, are assigned these duties; and

(2) The time spent by Chapter 1 personnel on these duties does not exceed the least of the following:

(i) The proportion of total work time that similarly situated non Chapter 1 personnel at the same school site spend performing these duties.

(ii) One period per day.

(iii) Sixty minutes per day.

(b) The amount of time referred to in paragraph (a)(2) of this section may be calculated on a daily, weekly, monthly, or annual basis.

(c) The duties in paragraph (a) of this section need not be limited to classroom instruction, but may include, but are not limited to, the following:

(1) Supervision of halls, playgrounds, lunchrooms, study halls, bus loading and unloading, and homerooms.

(2) Participation as a member of a school or district curriculum committee.

(3) Participation in the selection of regular curriculum materials and supplies.

(Authority: 20 U.S.C. 2853)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.49 paragraph (a) was amended by removing "LEA" and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.50 Prohibition against considering payments under the Migrant Education Program in determining State aid.

A State may not take into consideration payments under the Migrant Education Program in determining—

(a) The eligibility of an LEA for State aid; or

(b) The amount of State aid to be paid to an LEA for free public education.

(Authority: 20 U.S.C. 2854)

Subpart E—Evaluation

SOURCE: 54 FR 43230, Oct. 23, 1989, unless otherwise noted.

§ 201.51 Evaluation and demographic reports.

(a) *Operating agency evaluations.* (1) An operating agency shall evaluate, at least once every three years, the overall progress, including the educational progress, of migratory children who participate in its Chapter 1 migrant education projects, in terms of basic and more advanced skills that all children are expected to master. Progress must be measured—

(i) Against the desired outcomes described in the operating agency's application; and

(ii) Except for Chapter 1 migratory children in preschool, kindergarten, and first grade, in terms of student achievement in accordance with the national standards in § 201.53.

(2) (i) The operating agency shall determine whether improved performance of the Chapter 1 formerly migratory children, participating in a full school year program at least two years, is sustained over a period of more than 12 months.

(ii) To make this determination, an operating agency shall assess performance of the same children for at least two consecutive 12-month periods, provided these children continue to be enrolled in the schools of the operating agency.

EXAMPLE: An operating agency provides Chapter 1 migrant education services during the 1989-90 school year. The operating agency measures the gains made by participating children on a spring-spring testing cycle (spring 1989, 1990). To determine whether improved performance is sustained over the period of more than 12 months, the operating agency measures the performance again in the spring of 1991.

(3) The operating agency shall report its evaluation results to the SEA at least once during each three-year application cycle.

(b) *SEA evaluations.* (1) An SEA shall evaluate, at least every two years, the Chapter 1—Migrant Education Program in the State on the basis of the local evaluations conducted under paragraph (a) of this section and sections 1107 and 1202(a)(6) of the Act.

(2) The SEA shall ensure that its biennial evaluation report is representative of the statewide program.

(3) The SEA shall inform its operating agencies, in advance, of the specific data that will be needed and how the data may be collected.

(4) The SEA shall—

(i) By a date established by the Secretary, submit its evaluation to the Secretary; and

(ii) Make public the results of the evaluation.

(5) The SEA may require the operating agencies to evaluate the effect of the Chapter 1 migrant education projects on the children's achievement in basic and more advanced skills within the regular program, including, but not limited to, writing, science, history, or other subjects.

(c) *SEA's annual performance report.* (1) An SEA shall annually—

(i) Collect the evaluation and demographic data as required by section 1019 of the Act and specified by the Secretary for the SEA's annual performance report; and

(ii) Submit those data to the Secretary in that report.

(2) An operating agency shall provide to the SEA any data needed by the SEA to complete its annual report.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2722, 2729, 2781, 2782, 2835, 2852)

[54 FR 43230, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990; 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.51 was amended by removing "LEA" wherever it appears and adding, in its place, the words "operating agency", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date.

§ 201.52 Evaluation information to be collected.

(a) In assessing their programs and projects, the SEAs and operating agencies shall conduct evaluations that assess the overall progress of participating migratory children in grades 2 through 12, including educational progress, in terms of instructional services and support services.

(b) The evaluation design for the regular school year instructional project must include—

(1) Objective measures of the educational progress of project participants (including educational achievement in basic skills) as measured, if possible, over a 12-month testing interval through the use of appropriate forms and levels of national or State normed achievement tests. If this is not possible, the SEA or operating agency may use other acceptable measures of educational progress of migratory children, such as changes in attendance patterns, dropout rates, and other objectively applied indicators of student achievement compared to the performance of an appropriate non-project comparison group, as defined in § 201.54; and

(2) A measure for determining whether, for formerly migratory children who have been served under this part in a full school year program for at least two years, improved performance is sustained for at least one additional year.

(c) The evaluation design for the summer school instructional project must include—

(1) Objective measures of the educational progress of project participants (including educational achievement in basic skills) over the project performance period; and

(2) To the extent possible, a means of comparing project outcomes to those of an appropriate non-project comparison group.

(d) During either the regular or summer terms, the evaluation design for any support-service components must include—

(1) Measures of the effects of the project on participants that are consistent with the defined support services objectives. (For example, changes in student attendance rates may be an appropriate measure of the effect of guidance and counseling services.); and

(2) If possible, a means of comparing project outcomes to the performance of an appropriate non-project comparison group.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 2729, 2782, 2831, 2835)

[54 FR 43230, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990]

§ 201.53 General technical standards for evaluation.

SEAs and local operating agencies shall comply with the following technical standards in designing and implementing procedures for the evaluation of Chapter 1 migrant education projects:

(a) *Representativeness of evaluation findings.* The evaluation results must be computed so that the findings apply to the persons served in projects under the program. This may be accomplished by including in the evaluation either all or a representative sample of persons, schools, agencies, or projects.

(b) *Reliability and validity of evaluation instruments.* The evaluation instruments used must consistently and accurately measure progress toward accomplishing the objectives of the project, and must be appropriate considering factors such as the age, grade, mobility, language, degree of language fluency, and background of the persons served by the project.

(c) *Soundness of evaluation procedures.* The evaluation procedures must minimize error by providing for proper administration of the evaluation instruments, accurate scoring and transcription of results, and the use of analysis and reporting procedures that are appropriate for the data obtained from the evaluation.

(d) *Valid assessment of project outcomes.* The evaluation procedures must provide for accurate and objective measurement of the progress made by project participants towards defined project objectives.

(Authority: 20 U.S.C. 2729, 2782, 2831, 2835)

§ 201.54 Non-project comparison groups.

To fulfill the requirement for a non-project comparison group, appropriate comparison groups consist of persons who are as similar as possible in age, grade, language, degree of language fluency, previous achievement level, and other relevant background variables.

(Authority: 20 U.S.C. 2729, 2782, 2831, 2835)

[54 FR 43228, Oct. 23, 1989, as amended at 55 FR 22017, May 30, 1990]

EFFECTIVE DATE NOTE: At 55 FR 22017, May 30, 1990, in § 201.54 was amended by removing paragraph (b) and by removing the paragraph designation "(a)", effective either 45 days after publication in the FEDERAL REGISTER or later if Congress takes certain adjournments. The Department of Education will publish a document in the FEDERAL REGISTER at a later date, announcing the effective date. For the convenience of the user the superseded text reads as follows:

§ 201.54 Non-project comparison groups.

(b) To fulfill the requirements of § 201.52(b) and (c), SEAs and operating agencies, to the extent possible, must use appropriate forms and levels of national or State normed achievement tests.

§ 201.55 Submission of sampling plans.

(a) If an SEA wishes to use sampling in its evaluation of programs conducted under this part, the SEA shall submit, for prior approval by the Secretary, a proposed sampling plan designed to ensure that evaluations will be on a representative sample of its operating agencies in any school year.

(b) The Secrerary approves a sampling plan that will provide reliable and representative data under this subpart.

(c) (1) The SEA shall review its sampling plan at least once every three years.

(2) If, based on this review or other circumstances, the sampling plan requires changes, the SEA shall request reapproval of the plan by the Secretary.

(Authority: 20 U.S.C. 2835)

[54 FR 43230, Oct. 23, 1989]

EFFECTIVE DATE NOTE: At 54 FR 43230, October 23, 1989, § 201.55, was added, effective after the information collection requirements have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980.

§ 201.56 Use of evaluation results for program improvement.

SEAs and operating agencies must ensure that the results of their evaluations are used to improve services provided to the children in their Chapter 1 migrant education programs and projects.

(Approved by the Office of Management and Budget under control number 1810-0519)

(Authority: 20 U.S.C. 20 U.S.C. 2729, 2782)

[54 FR 43230, Oct. 23, 1989, as amended at 55 FR 6982, Feb. 28, 1990]

§§ 203.55—203.59 [Reserved]

PART 205—CHAPTER 1—MIGRANT EDUCATION COORDINATION PROGRAM FOR STATE EDUCATIONAL AGENCIES

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AUTHORITY: 20 U.S.C. 2783, unless otherwise noted.

SOURCE: 48 FR 34646, July 29, 1983, unless otherwise noted.

Subpart A—General

§ 205.1 Purpose.

Chapter 1—Migrant Education Coordination Program for State Educational Agencies is designed to provide financial assistance to State educational agencies (SEAs) for projects designed to improve interstate and intrastate coordination of migrant education activities among SEAs and local educational agencies (LEAs). The projects may be designed to include SEAs, LEAs, and other operating agencies participating in the Chapter 1 Migrant Education Program.

(Authority: 20 U.S.C. 2733)

[48 FR 34646, July 29, 1983, as amended at 54 FR 20053, May 9, 1989]

§ 205.2 Eligibility to participate as a grantee.

Only SEAs, either individually or cooperatively (i.e., through a group or consortium), may apply for a grant under this program.

(Authority: 20 U.S.C. 2783)

§ 205.3 Regulations that apply.

The following regulations apply to this program:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75 (Direct Grant Programs), Part 77 (Definitions that Apply to Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, and Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in this Part 205.

(Authority: 20 U.S.C. 2783)

[54 FR 20053, May 9, 1989]

§ 205.4 Definitions that apply.

The definitions that are included in the regulations for the Chapter 1 Migrant Education Program (34 CFR Part 201) apply to this program.

(Authority: 20 U.S.C. 2783)

[48 FR 34646, July 29, 1983, as amended at 54 FR 20053, May 9, 1989]

§ 205.5 Acronyms.

The following acronyms are used frequently in these regulations:

"LEA" means local educational agency.

"SEA" means State educational agency.

(Authority: 20 U.S.C. 2783)

APPENDIX E

Subpart B—Types of Activities That the Secretary Assists Under This Program

§ 205.10 Types of projects that may be funded.

The Secretary may make grants for a period not to exceed three years to an SEA or SEAs to carry out among State and local educational agencies projects designed to improve the interstate and intrastate coordination of the educational programs available for migratory students.

(Authority: 20 U.S.C. 2783)

[48 FR 34646, July 29, 1983, as amended at 54 FR 20053, May 9, 1989]

Subpart C—How To Apply for a Grant

§ 205.20 Information required in an application.

In applying for a grant, an SEA shall follow the procedures and meet the requirements stated in Subpart C of 34 CFR Part 75.

(Approved by the Office of Management and Budget under control number 1810-0028)

(Authority: 20 U.S.C. 2783)

§ 205.21 Specific information required in a group application.

In applying for a grant, an SEA shall provide information relevant to any proposed consortium of SEAs (for a group application only) as required by Subpart C of 34 CFR Part 75. In addition, the application must include:

(a) An identification of each SEA proposed to participate in the consortium;

(b) A description of the proposed objectives of the consortium; and

(c) A description of how each SEA proposed to participate in the consortium was involved in the development of the proposed objectives and activities of the project.

(Authority: 20 U.S.C. 2783)

§ 205.22 Consultation with other agencies.

An applicant SEA under the Migrant Education Interstate and Intrastate Coordination Program shall plan and develop its project in consultation and coordination with other SEAs or with participating LEAs, as appropriate.

(Authority: 20 U.S.C. 2783)

Subpart D—How Grants Are Made

§ 205.30 Application evaluation.

(a) The Secretary evaluates an application under this program on the basis of the criteria in § 205.31 of these regulations.

(b) The Secretary awards up to 100 possible points for meeting these criteria.

(c) The maximum number of points possible for meeting each individual criterion is indicated in parentheses after the heading for that criterion.

(Authority: 20 U.S.C. 2783)

§ 205.31 Selection criteria for reviewing an application.

(a) *Interstate and intrastate consultation and coordination.* (30 points) (1) The Secretary reviews each application for information that shows the quality of the applicant SEA's proposed consultation and coordination with other SEAs or with participating LEAs, as appropriate to effect improved interstate and intrastate coordination of programs available for migratory students (10 points).

(2) The Secretary reviews each application to determine the extent to which the proposed activities address unmet national needs (10 points).

(3) The Secretary looks for information that shows that the applicant SEA:

(i) Has consulted and coordinated adequately with other SEAs or participating LEAs, as appropriate, in planning, developing, and disseminating its project (5 points); and

(ii) Will consult and coordinate adequately with other SEAs or participating LEAs, as appropriate, in implementing and evaluating its project and in disseminating the results of the project (5 points).

(b) *Plan of operation.* (25 points) (1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows the following:

(i) High quality in the design of the project.

(ii) An effective plan of management that insures proper and efficient administration of the project.

(iii) A clear description of how the objectives of the project relate to the purpose of the program.

(iv) A clear description of the way that the applicant SEA plans to use its resources and personnel to achieve each objective of the project.

(v) A clear description of how the applicant SEA will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(vi) A clear description of how the applicant SEA will provide an opportunity for participation of students enrolled in private schools.

(c) *Quality of key personnel.* (15 points) (1) The Secretary reviews each application for information that shows adequate qualifications of the key personnel the applicant SEA plans to use in the project.

(2) The Secretary looks for information that shows the following:

(i) The qualifications of the project director (if one is to be used).

(ii) The qualifications of each of the other key personnel to be used in the project.

(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section plans to commit to the project.

(iv) The extent to which the applicant SEA, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as:

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine personnel qualifications, the Secretary considers experience and training—in fields related to the objectives of the project—as well as other information that the applicant SEA provides.

(d) *Budget and cost effectiveness.* (15 points) (1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows the following:

(i) The budget for the project is adequate to support the project activities.

(ii) Costs are reasonable in relation to the objectives of the project.

(e) *Evaluation plan.* (10 points) (1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

CROSS-REFERENCE. See 34 CFR 75.590 of EDGAR (Evaluation by the grantee).

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(f) *Adequacy of resources.* (5 points) (1) The Secretary reviews each application for information that shows that the applicant SEA plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows the following:

(i) The facilities that the applicant SEA plans to use are adequate.

(ii) The equipment and supplies that the applicant SEA plans to use are adequate.

(Authority: 20 U.S.C. 2783)

§ 205.32 Factors considered in awarding a grant.

In awarding grants, the Secretary considers:

(a) The amount of funds available for grants under the program;

(b) The rank order of the applications—as determined by using the criteria listed in § 205.31 of these regulations; and

(c) Other information contained in the application or that is otherwise relevant to a selection criterion or re-

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quirement that applies to the selection of applications for new grants.

(Authority: 20 U.S.C. 2783)

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APPENDIX F

SERVICES TO PRIVATE SCHOOL CHILDREN

Q1. What are the statutory and regulatory requirements that children in private schools be served in the Migrant Education Program?

A. Section 1202(a)(3) of the statute requires that the Migrant Education Program be administered consistent with the basic objectives of Section 1012. Section 1012(c)(2) requires that local applications contain an assurance that the applicant will make provision for services to children attending private elementary and secondary schools in accordance with Section 1017 of the statute. In keeping with this statutory scheme, Section 201.17(b)(3) of the regulations requires that an operating agency application contain an assurance of adherence to program requirements in Section 201.35 and 201.36. Section 201.36(d) requires the SEA to ensure that services are provided to all significant concentrations of eligible migratory children enrolled in private schools, consistent with the service priorities in Section 201.31, in accordance with the basic objectives of Section 1017 of the statute.

Q2. What are an SEA's responsibilities with regard to provision of MEP services by operating agencies to children in private schools?

A. When the SEA receives a grant to operate the Migrant Education Program, it must provide assurances that it will comply with all applicable statutory and regulatory requirements. When making subgrants to local operating agencies, the SEA must ensure that the operating agencies comply with these applicable regulatory and statutory requirements.

Thus the SEA, like each operating agency, is responsible for ensuring that services are provided to all significant concentrations of eligible migratory children enrolled in private schools, consistent with the service priorities in Section 201.31, in accordance with the basic objectives of Section 1017 of the statute. (See Section 201.36 of the regulations.)

Q3. Given that the "basic objectives" of Section 1017 apply to the operating agency's program, how does Section 1017 affect the ways in which these agencies make provision for the special educational needs of migratory children attending private schools?

A. The operating agency's efforts must:

1. include timely and meaningful discussions with private school officials about the MEP activities (and arrangements for MEP activities) in which migratory children with special educational needs attending private schools may participate;
2. ensure that these activities meet basic program requirements applicable to all MEP funded activities for students enrolled in non-private schools; and
3. ensure that these activities are provided equitably to private and non-private

school migratory children, taking into account the number of children to be served and the special educational needs of such children.

The provisions in Section 1017(b) through (d) regarding bypass, complaint procedures, and capital expenditures are not applicable to the MEP.

Q4. If the bypass provisions in Section 1017(b) of the Chapter 1 statute do not apply in the case of an SEA or operating agency's failure to provide equitable MEP services to migratory children in private and non-private schools, may the Secretary arrange for a bypass under other authority?

A. Yes. The Secretary has broad authority under Section 1202(d) of the statute and Section 201.24 of the regulations to make a special arrangement for services with one or more public or non-profit private agencies to carry out MEP activities in the State, if the Secretary determines that the SEA is unwilling to or unable to conduct an educational program for migratory children who are eligible to be served. The Secretary would make such a special arrangement only after the SEA has had reasonable notice and an opportunity for a hearing. (See the Bypass section in Chapter I of this manual.)

Q5. Do the recent court cases, in particular Aguilar v. Felton, which dealt with children attending religiously affiliated private schools, affect the MEP?

A. Yes. These court cases, most notably Aguilar v. Felton, which have dealt with the manner in which private school children may be served with Chapter 1 funds in light of constitutional requirements contained in the First Amendment, pertain to the Chapter 1 MEP.

Most significant is the prohibition in Aguilar v. Felton against Chapter 1 personnel providing instructional services in religiously affiliated schools. ED issued guidance on the Felton decision in August 1985, June 1986, and April 1987 to the Chief State School Officers and the Chapter 1 LEA program directors. That guidance was incorporated in the appropriate sections of the Chapter 1 Policy Manual, and for convenience is also included, as applicable, in this appendix. Although most of the situations which that guidance addresses will rarely occur in the MEP, the guidance is repeated here because of its importance where these situations do arise.

Q6. What are the operating agency's requirements for consultation with private school officials?

A. The requirements for consultation with private school officials include "timely and meaningful consultation with appropriate private school officials." To meet this requirement, an operating agency is required to consult with private school officials before making any decision that affects the opportunities of eligible private school children to participate in the MEP project. In other words, consultation must occur during all phases of the design and development of the MEP project, including consideration of which children will receive services, how the children's needs will be identified, what services will be offered, how and where the services will be provided, and how the project will be evaluated.

Q7. ***May Chapter 1 MEP instructional personnel consult with private school personnel?***

A. Yes. MEP teachers and other instructional personnel may consult with instructional staff from the private school in order to coordinate the MEP program with the regular classroom instructor and to facilitate the success of the services provided. Such consultation should not occur at the site of the MEP services while the services are being provided. To the extent practicable, the operating agency may wish to have this consultation occur at a public school site, other neutral site, or by telephone.

Q8. ***If the officials of the private school do not wish to have their children participate in the MEP, is the SEA still required to serve these children?***

A. No. If after consultation with the private school officials, the officials of that school do not wish to have their students participate in the MEP, then the SEA is not required to provide MEP services to these children. However, consultation must include a clear explanation of the various ways in which the operating agency can help to provide services to children attending private schools.

Q9. ***Which children attending private schools are eligible to receive MEP services?***

A. Children attending private schools are eligible if, in any given school or school campus, there are significant concentrations of them who meet (1) the requirements to be considered migratory as defined in Section 201.3 of the regulations; (2) the service priority criteria in Section 201.31; and (3) the needs assessment criteria in Section 201.32.

Q10. ***Is the SEA responsible for assessing the needs of private school children in the State?***

A. Yes. The SEA is required to conduct a statewide needs assessment of eligible migratory children in the State, including children enrolled in private schools. Section 201.32 requires the SEA and the operating agencies to identify all eligible migratory children in the State, including those migratory children enrolled in private schools, and to design its program on the basis of that information, including the information on eligible migratory children in private schools.

Q11. ***May the SEA provide services to private school children that are not the same as those provided to public school children?***

A. Yes. While the statute requires that services be provided equitably to private and non-private school children, these services do not have to be the same to be equitable. If the needs assessment reveals that private school children have different educational needs than public school migratory children, then the services would not have to be same to be equitable.

Q12. ***What is meant by "equitable services"?***

A. Services are considered to be equitable if the SEA: (1) assesses, addresses, and evaluates the needs and progress of both groups of children in the same manner; (2)

provides, in the aggregate, approximately the same amount of instructional time and materials for children with similar needs; (3) spends an equal amount of funds to serve similar public and private school children; and (4) provides private school children an opportunity to participate in the program equitable to the opportunity provided public school children.

Q13. May an operating agency provide services to private school children that are not equitable to those provided to public school children, if, after receiving an offer of equitable services, private school children choose to participate in only some of the services?

A. The statute requires that the operating agency (and the SEA) provide equitable services for private school children; it does not require that private school children accept or participate in all those services. The LEA must design and offer to provide services for private school children which are equitable to those being provided children attending public schools. If private school children choose to participate in only some of those services, and decline to participate in others, the SEA will have met its responsibility by providing those services in which private school children wish to participate. The operating agencies should continue to offer equitable services in future years, however, rather than offer only those services in which children participated in the past.

Q14. What if, after making an equitable offer to serve children attending private schools, participation in the MEP by these children is low?

A. If, in spite of an offer by the operating agency to provide equitable services, participation remains low, the operating agency and the SEAs are encouraged to determine why that is so and, if appropriate, modify the project in a manner that will maximize participation by private school students. For instance, the operating agency may be providing MEP services to private school children at a neutral site very near the private school and escorting the children to and from the neutral site. While the offer may provide equitable services, many eligible private school children are not participating. In an effort to increase participation, the operating agency could decide, for example, to provide computer assisted instruction (CAI) for children whose parents prefer not to have them leave the private school.

Q15. Which operating agency is responsible for serving children who reside within a geographical area served by one operating agency and who attend a private school located in a geographical area served by another?

A. The SEA is responsible for determining which operating agency will provide such services to children who reside within a geographical area served by one operating agency and who attended a private school located in a geographical area served by another.

Q16. May an SEA revise its services for public school students so that they are equitable with those for private school students?

A. Yes. In some cases it may be necessary to adjust the manner in which services are provided to public school students.

Q17. If an operating agency's application does not provide adequately for equitable services to private school children, or explain why no service will be provided to them, may an SEA approve it?

A. No. Furthermore, the operating agency has no authority to expend funds until the SEA approves the application.

Q18. How are services to private school children to be monitored by the SEA?

A. The SEA must monitor services for private school students in the same way it monitors services to public school children. In addition, the SEA must ensure that operating agencies provide equitable services to private school students.

Q19. May MEP personnel go on the premises of religiously affiliated private schools to provide MEP instructional services?

A. No. In Aguilar v. Felton, the Supreme Court held that Chapter 1 personnel may not provide instructional services on the premises of religiously affiliated private schools. Instructional services for those children must be provided at sites that are neither "physically nor educationally identified with the functions of the private school." See Wolman v. Walter, 433 U.S. 229, 246-47 (1977).

Q20. May MEP personnel enter a religiously affiliated private school in order to escort private school children from their rooms to services held outside the private school and to return them to their rooms?

A. Yes. The provision of escort services where needed is permissible as long as no instruction is occurring as the children are being escorted. Under these circumstances, the duties are non-instructional and are designed merely to protect the health and safety of the children. As noted above, the Supreme Court in Felton only prohibited Chapter 1 instructional services on the premises of religiously affiliated private schools. The Court in Wolman and previously in Everson v. Board of Education, 330 U.S. 1, 17-18 (1947), recognized that services related to the health and safety of children are permissible even if provided at religiously affiliated private schools. Therefore, the use of escorts does not raise the entanglement problems at issue in the Felton case.

Q21. Are MEP programs on nonreligious private school premises affected by the Aguilar v. Felton decision?

A. No.

Q22. Does the term "teacher" as used in Aguilar v. Felton include other public school personnel?

A. The second circuit opinion affirmed by the Supreme Court in Aguilar v. Felton forbade "the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services." However, the Supreme Court in an earlier case, Wolman v.

Walter, distinguished the role of the diagnostician from that of the teacher or counselor with regard to services in the private school. ED views testing to select children as part of diagnosis; hence, on-premises testing for student selection is not prohibited under Felton.

Q23. May private school students be provided services in public schools or at neutral sites during regular school hours, before or after school, or on weekends?

A. Yes. These options are all available, but the services must be equitable to services provided public school children.

Q24. May private school children receive MEP services in the private school before or after regular school hours or on weekends?

A. No.

Q25. May private school children receive services with public school children in a summer school program?

A. Yes, but services must be equitable to those provided public school children. To provide only summer activity for private school children, while serving public school children during both the regular term and summer, would not be equitable.

Q26. Where may summer school services be provided?

A. At any site allowable during the regular school year.

Q27. Has the SEA responsibility for providing services on an equitable basis to eligible private school children changed?

A. No, it was not changed by the Court's decision.

Q28. If an operating agency provides MEP services to private school children in the public schools, may the operating agency charge the MEP a reasonable amount for the space used? How are such costs allocated?

A. Yes. Reasonable and necessary costs for public school space used for the instruction of private school students are allowable. Reasonable and necessary costs are those in excess of what the operating agency would incur in the absence of the MEP. For example, the cost of a classroom in a building already in use would not be an excess cost. Special costs incurred in preparing and maintaining it for occupancy by the MEP would be allowable.

Q29. May a private school child take onto private school premises MEP instructional materials for his or her use as part of the child's MEP program?

A. Yes.

Q30. May a neutral, third-party contractor provide MEP instructional services on the premises of a religiously affiliated private school?

A. No.

Q31. May operating agencies use mobile vans or other portable units to provide MEP services to children enrolled in religiously affiliated private schools? If yes, where may an operating agency place a mobile or portable unit?

A. Yes. The use of mobile or portable units for the provision of MEP services to private school children is allowable. In deciding where to place a unit, operating agencies should be aware that the Supreme Court has previously held that the Establishment Clause of the First Amendment is not violated when units are located on public property near the private school. See Wolman v. Walter, 433 U.S. 229, 246-47 (1977). Such locations, as well as other locations not owned by the private school or a religious organization, are plainly acceptable sites for mobile or portable units.

The Supreme Court has not ruled on the constitutionality of placing a mobile or portable unit on property belonging to a religiously affiliated private school, and there may be differing views on this subject. (One Federal Court of Appeals has held that the placement of portable or mobile units on the property of a religiously affiliated school is constitutional Pulido v. Cavazos.) Given existing case law, it is the view of ED that, under certain circumstances, mobile or portable units may constitutionally be placed on such private school property.

ED believes that the courts would approve delivery of services in locations on private school property that fit the Supreme Court's characterization of the site that it found acceptable in Wolman v. Walter, i.e., a site "neither physically nor educationally identified with the functions of the non-public school." While the Court has not held that other locations are constitutionally impermissible, we believe that services at locations fitting this characterization are most likely to withstand judicial scrutiny. ED believes that one way in which the use of a mobile or portable unit at a given location on the property of a religiously affiliated private school will comport with this standard is if the following conditions are met:

1. The property is at a sufficient distance from the private school building(s) so that the mobile or portable unit is clearly distinguishable from the private school facilities used for regular (non-MEP) instruction.

2. The mobile or portable unit is clearly and separately identified as property of the operating agency and is free of religious symbols.

3. The unit and the property upon which it is located are not used for religious purposes or for the private school's educational program.

4. The unit is not used by private school personnel.

In addition to the conditions stated above, an operating agency may find that the following two further guidelines may bolster its decision to locate units on the property of a religiously affiliated private school:

1. Before placing a unit on private school property, the operating agency can determine that other locations for the services are unsafe, impracticable, or substantially less convenient for the children to be served.

2. The operating agency could enter into a lease arrangement with the private school for the use of the land owned by the private school upon which the unit is to be situated.

Q32. What are some examples of property owned by a religiously affiliated private school that would meet the above criteria?

A. Such property might include:

1. Land near the school that is separated from the school by an undeveloped plot of land or other terrain features and that is used neither for religious purposes nor the school's educational program.

2. A portion of a private school playground that is fenced in and has direct access to a public street.

3. Those portions of a parking lot that are not immediately adjacent to the private school.

Q33. May a religiously affiliated private school building be used as a power source for a unit?

A. Yes. There is nothing to prohibit public schools from arranging for power from any source. However, care must be exercised in the placement of the unit to make certain that the unit is separate from the private school building. If the use of the power source results in the need for repair, remodeling, or construction of private school facilities, MEP funds may not be used for such repair, remodeling, or construction. (See 34 CFR §200.55.)

Q34. May the operating agency pay the private school with MEP funds for the power or for leasing property?

A. Yes. The private school, however, may not charge more than a reasonable amount as determined under local conditions.

Q35. Who is responsible and liable for the safety of private school children during the time they walk or ride to a neutral site to be served by the MEP program?

A. Generally, the operating agency is responsible for providing for the transporting of these children to a neutral site. The question of liability, however, would be determined in accordance with State and local laws and would depend on the specific facts of the situation.

Q36. What can a small rural operating agency with a small MEP allocation do to provide equitable services consistent with the Felton decision?

A. Rural operating agencies may have special problems because of small allocations and large distances between the private schools and available locations for providing services. The operating agencies may wish to consider leasing rather than purchasing equipment, renting a neutral site, or using home tutoring components to provide equitable services. They may also wish to set up a joint project with neighboring operating agencies, and submit a combined application.

Q37. May MEP funds be used to install necessary electrical wiring in order to operate MEP Computer Assisted Instruction (CAI) programs at a private school?

A. Yes. Reasonable installation costs are allowable under certain circumstances. In approving such costs, SEAs must be aware that Section 200.55 of the Chapter 1 regulations states that "[n]o funds under this part may be used for repairs, minor remodeling, or construction of private school facilities." Nevertheless, one way in which the installation would be permissible is if:

- the installation is necessary in order for the MEP program to operate;
- the cost is related solely to the CAI program and does not otherwise correct a deficiency in the facility;
- the installation does not result in any improvement to the private school facilities other than the electrical wiring related to the MEP computer(s); and
- the representatives of the private school agree either to reimburse the MEP program for the residual value of the wiring (the installation cost minus depreciation), or to have the operating agency remove the wiring if the CAI program is terminated at the site.

Q38. May MEP funds be used to provide a technician in a religiously affiliated private school to operate and maintain CAI equipment and keep order as needed in the CAI MEP classroom?

A. Yes. A technician may be paid from MEP funds to operate and maintain the CAI equipment and keep order, but cannot provide instructional services in the religiously affiliated private school. The Supreme Court in the Felton case prohibited the provision of Chapter 1 instructional services in religiously affiliated private schools, but did not rule on the provision of technical, non-instructional services in those schools. In Wolman v. Walter, the Supreme Court upheld the provision of technical services, such as those of a diagnostician, on the premises of a religiously affiliated private school. The Court found that the nature of that relationship "does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student" 433 U.S. 229, 224 (1977). Thus, the placement of a technician in a CAI MEP classroom does not raise the entanglement problems at issue in the Felton case.

Q39. May equipment be placed on the premises of a religiously affiliated private school to provide CAI under MEP to eligible children enrolled in the school?

A. Yes. CAI equipment may be placed on the premises of a religiously affiliated private school under certain circumstances. ED believes that such a placement will withstand judicial scrutiny if the following criteria are met:

1. As with all Chapter 1 programs serving private school children, the CAI program must be under the LEA's direction and control. On-site review by public school officials must be limited, however, to such things as the installation, repair, inventory, and maintenance of equipment.

2. Private school personnel may be present in CAI rooms to perform limited non-instructional functions such as maintaining order, assisting children with equipment operations (such as turning the equipment on and off, demonstrating the use of the computers, and accessing MEP programs), and assisting with the installation, repair, inventory, and maintenance of the equipment.

3. Neither public nor private school personnel may assist the students with instruction in the CAI room. Public school personnel may, however, assist by providing instruction through computer messages, by telephone, or by television.

4. Access to the computer equipment and the rest of the program must be limited to MEP eligible children.

5. Equipment purchased with MEP funds may not be used for other than MEP purposes. Only software directly related to the MEP program may be used with the CAI.

Q40. Does CAI by itself meet the equitability requirement of the statute?

A. Eligible private school children must receive services that are equitable in comparison to the MEP services provided to public school children in terms of both the quality and the costs of the services. When both public and private school children are receiving the same CAI service, the equitable services requirement of the statute is met. When CAI is being provided to private school children while public school children are receiving direct instruction from a teacher, the question of equitability is more difficult. This may be especially true in a year after the computers were purchased since, after the initial purchase of equipment, CAI normally provides services at a cost less than the typical MEP program. (This problem may not exist, however, if the cost of the equipment is spread out over a number of years. (See the next Q.) If CAI alone does not provide services equitable to those being provided public school children, the LEA should offer additional services, such as after school tutorial sessions or appropriate summer school programs, to make the offer equitable.

Whether the services provided by an operating agency to private school students are equitable to those provided to children in public school is measured by factors discussed in Section 200.52(b) of the regulations.

Q41. May the cost of purchasing a computer be spread out over a period of years for the purpose of meeting the equitable costs requirement?

A. The cost of a computer may be spread over a period of years by such means as leasing the equipment, arranging for a lease-purchase agreement, or by paying for the equipment in installments. The operating agency may also buy the equipment with local funds, and at the time of purchase agree to have the MEP program proportionately reimburse the local funds each year.

RELATIONSHIP OF GENERAL CHAPTER 1 STATUTORY PROVISIONS AFFECTING STATE AND LOCAL AGENCIES TO THE MIGRANT EDUCATION PROGRAM

Statute	Scope	Applicability to MEP	Regulation
Sec. 1001	Policy and Purpose	On Own Terms	None
Sec. 1011(a)	Uses of Funds: Program Description	Basic Objectives: Sec. 1202(a)(3)	201.48
Sec. 1011(b)	Uses of Funds: Innovative Projects	Not Applicable	
Sec. 1012(a)	Assurances and Applications: SEA Assurances	Basic Objectives: Sec. 1202(a)(3)	201.11(b)
Sec. 1012(b)	Assurances and Applications: Local Applications	Basic Objectives: Sec. 1202(a)(3)	201.17, 201.18(a)
Sec. 1012(c)	Assurances and Applications: Local Assurances	Basic Objectives: Sec. 1202(a)(3)	201.17(b)
Sec. 1013	Eligible Chapter 1 Schools	Not Applicable	
Sec. 1014(a)	Eligible Children: General Provisions	Basic Objectives: Sec. 1202(a)(3)	201.3, 201.36(a)
Sec. 1014(b)	Eligible Children: Needs Assessment	Basic Objectives: Sec. 1202(a)(3)	201.32
Sec. 1014(c)	Eligible Children: LEA Discretion	Only paragraph (c)(2) re: skipping students already being served (Basic Objectives - Sec. 1202(a)(3))	201.32(d)
Sec. 1014(d)	Eligible Children: Special Rules for Handicapped, LEP, and N & D Children	Basic Objectives: Sec. 1202(a)(3)	None, but see chapter VI of the manual
Sec. 1015	Chapter 1 Schoolwide Projects	Not Applicable	

APPENDIX C

Statute	Scope
Sec.1016	Chapter 1 Parental Involvement
Sec. 1017	Participation of Private School Children
Sec. 1018(a)	Fiscal Requirements: Maintenance of Effort
Sec. 1018(b)	Fiscal Requirements: Supplement Not Supplant
Sec. 1018(c)	Fiscal Requirements: Comparability of Services
Sec. 1018(d)	Fiscal Requirements: Exclusion of State and Loc Funds
Sec. 1019(a)	Evaluations: Local Evaluation
Sec. 1019(b)	Evaluations: State Evaluations
Sec. 1019(c)	Evaluations: Special Conditions for K-1 Children
Sec. 1020	State Program Improvement Plan
Sec. 1021	LEA Program Improvement
Sec. 1404(a)	Payments for State Administration
Sec. 1451	State Regulations
Sec. 1452	Records and Information
Sec. 1453	Assignment of personnel tc non-Chapter 1 duties

	Applicability to MEP	Regulation
	Sec. 1202(a)(4)	201.35(c)
	Basic Objectives: Sec. 1202(a)(3)	201.36(d)
	Basic Objectives: Sec. 1202(a)(3)	201.41, 201.42
	Basic Objectives: Sec. 1202(a)(3)	201.43
	Basic Objectives: Sec. 1202(a)(3)	201.44
al	Basic Objectives: Sec. 1202(a)(3)	201.45
	Not Applicable (but see comparable MEP provision in Sec. 1202(a)(6))	201.51-201.56
	On Own Terms; see Secs. 1019(b)(1) and 1202(a)(6)	201.51-201.56
	Not Applicable, but accepted as MEP rule	201.52(a)
	Not Applicable, but see relevant regulations	201.36(c), 201.56
	Not Applicable, but see relevant regulation	201.56
	On Own Terms	201.23
	Basic Objectives: Sec. 1202(a)(3)	201.46
	Basic Objectives: Sec. 1202(a)(3)	80.42 (EDGAR)
	Basic Objectives: Sec. 1202(a)(3)	201.49

Statute	Scope
Sec. 1454	Prohibition Regarding State Aid

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Applicability to MEP	Regulation
Basic Objectives: Sec. 1202(a)(3)	201.50